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JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

OCTOBER TERM 1902.

No. 259.

THE REPUBLIC OF COLOMBIA, APPELLANT,

vs.

THE CAUCA COMPANY AND THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE REPUBLIC OF COLOMBIA.

WM. G. JOHNSON,
Counsel for the Republic of Colombia.

LAW REPORTER COMPANY, PRINTERS, WASHINGTON D. C.

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STATEMENT.

This is an appeal from a final decree of the Circuit Court of Appeals for the Fourth Circuit (Rec. p. 1318), affirming the final decree of the Circuit Court for the District of West Virginia (Rec. p. 1304).

No opinion was rendered by the court below upon any of the questions presented by the assignment of errors, the court merely concurring in the opinion of the circuit court (Rec. pp. 1317–18), which opinion is set out in full in the record (Rec. 1283–1302).

The proceeding was begun by a bill in equity brought by appellant, a body corporate and politic under the law of nations and a foreign State, within the meaning of the Constitution of the United States, against the appellees, the

Cauca Company and the Colombian Construction and Improvement Company, two certain commercial corporations created by and existing under the laws of one of the United States, namely, the State of West Virginia (Rec. pp. 1–19).

The proceeding seeks to have a certain pretended award, made by two of three arbitrators, decreed to be null and void and to be delivered up and canceled, and to have the defendants perpetually enjoined from asserting in any way the validity of the said pretended award (Rec. p. 18).

The alleged award (Rec. pp. 66–67) was made in the city of New York on the 22d day of October, 1897, by two of three arbitrators, and is for the sum of $652,048.93, less the sum of $200,000 paid before the submission was entered into, and purports to be the amount found due from the Republic of Colombia to the Cauca Company under the terms of an agreement between the Republic of Colombia and the Cauca Company, made on January 4, 1897, for a submission (Rec. pp. 59–63, 1207–11) to arbitration by a commission of three persons.

The said alleged award also requires the Republic of Colombia to pay to the attorney of the Cauca Company the sum of $10,000 for his services to his client in the proceedings before the arbitrators (Rec. p. 67).

The agreement for submission (Rec. pp. 1207–11), which concerned the differences which had arisen between the Government of Colombia and the Cauca Company growing out of the contract for the construction of the Cauca Railroad (Rec. p. 1207), empowered the arbitrators to fix (Rec. p. 1208, Art. II):

> "a just indemnity for the works and labors which the company may have executed during the time in which the undertaking has been in its charge, and for the rolling stock and other things it may have introduced destined for the railroad, and which at present exist."

The agreement for submission is between the Republic of

Colombia and the Cauca Company and concerns them only, the other defendant, the Colombian Construction and Improvement Company, not being a party to nor mentioned in the agreement for submission (Rec. pp. 59–63, 1207–11).

By a stipulation entered into by the parties before the arbitrators it was agreed that the arbitrators should find that the sum of $233,909.14 had been expended by the Cauca Company in construction work and equipment (Rec. p. 70).

The award, including this stipulated sum, aggregates the sum of $662,048.93, and giving credit for the $200,000 paid by the Government at the time of the execution of the submission finds a balance due from Colombia to the Cauca Company of $462,048.93 (Rec. pp. 66–7).

It is composed of the following items:

Total cost of construction, work, and materials of every kind and description, and of rolling stock, tools, etc., as per stipulation	$233,909	14
Interest on above amount of cost of construction	48,668	18
Salaries of executive officers of the Colombian Construction and Improvement Company, *not a party to the submission*	108,181	42
Traveling expenses of the executive officers of the said Colombian Construction and Improvement Company	29,386	30
Part of the sum of $50,000 alleged to have been allowed to Cherry and Schramme by the said Colombian Construction and Improvement Company, February 15, 1897, forty-two days after signing of the submission, for services in securing the agreement for submission	20,200	00
Office expenses, sundries, and clerical hire of New York office of the said Colombian Construction and Improvement Co.		

Interest on bonds	32,333 40
Amount alleged to have been paid to Cherry for the concession by the Colombian Construction and Improvement Company	135,000 00
Interest on this amount	13,643 33
Counsel fees to Marcus Stine, counsel for Cauca Company before the arbitrators	10,000 00

(Rec. pp. 661, 703, 853.)

The first item of $233,909.14 is not disputed, its validity being conceded by the original bill (Rec. p. 16); but the validity of all the other items is disputed.

Of these disputed items the court below disallowed the three items of interest and the ten thousand dollar counsel fee, amounting in all to $104,644.91 (Rec. pp. 1304–5). All the other items, being alleged obligations of the said *Colombian Construction and Improvement Company*, not a party to nor mentioned in the submission, the court allowed as coming properly within the scope of the submission; that is, as being what the *Cauca Company* had expended on the works executed by it in the construction of said railway and for rolling stock, tools, etc., imported for use on said railway.

The grounds of the invalidity of these disputed items are set forth in the bill and will be considered in detail in the argument; but it may be here stated that the principal grounds of objection are the following:

(1) None of the *subjects* of the alleged expenditure were within the terms of the submission, and, therefore, all were without the jurisdiction of the arbitrators.

(2) All the alleged expenditures, if made at all, were made by a *stranger to the submission*, the *Colombian Construction and Improvement Company*, neither a party to nor mentioned in the submission, and no one of them was made by or constituted a liability of the *Cauca Company*, the *only party* whose expenditures of any kind were submitted to the arbitrators.

Although the Cauca Company alone was party to the submission, yet as the disputed items of the award are founded exclusively upon alleged expenditures by the Colombian Construction and Improvement Company, a total stranger to the submission, and the complainant was not advised what interest it might claim in said award, by reason of that fact, it was made a party defendant, and in the twenty-fourth paragraph of the bill was called upon to discover what, if any, rights it pretends to have in the premises (Rec. pp. 11–12).

The defendants answered jointly (Rec. pp. 872–903), and on the 8th of June, 1898, the said defendants filed their joint cross-bill (Rec. pp. 1080–1096) in which, among other things, they prayed a decree of specific performance of the award (Rec. p. 1095). The appellant answered the cross-bill (Rec. p. 1097), and after testimony had been taken the cause came on for hearing before Judge Goff, and on the 11th of March, 1901, a decree was entered sustaining the award to the extent of $357,404.02, and disallowing the sum of $104,644.91, and as to such latter sum perpetually enjoining the defendants (Rec. pp. 1304–5).

From this decree both complainant and defendants appealed to the Circuit Court of Appeals (Rec. pp. 1305–16), and on the 8th of February, 1902, the decree of the circuit court was affirmed (Rec. p. 1318). On the 10th of February, 1902, the complainant appealed to this court (Rec. pp. 1319–23), and on the same day the said appeal was allowed by the Circuit Court of Appeals (Rec. p. 1324).

This case has its origin in a legislative contract between the Republic of Colombia through its National Congress and one James L. Cherry for the construction, equipment, and opening to traffic of a railroad, in the territory of Colombia, from the port of Buenaventura to the inland city of Manizales by way of the city of Cali (Rec. pp. 26–37), a portion of which was already constructed and in actual operation (Rec. pp. 1141, 1142).

Buenaventura is situated on an island in the bay of that name on the Pacific coast (Rec. p. 1139), and is third in importance of the seaports of that nation (Rec. p. 1150). Cali is a city of about twenty-five thousand inhabitants, situated in the interior (Rec. p. 1150), in the Cauca valley, on the eastern side of the mountains (Rec. p. 1149), distant about eighty-five miles from Buenaventura (Rec. p. 1149), while Manizales, the terminus of the proposed road, is at the northern extremity of the Cauca valley, about one hundred and thirty miles from Cali (Rec. p. 1149).

The Cauca valley has an area of about one thousand square miles and is a country of extraordinary richness (Rec. p. 1150), but the natural development of it is retarded for the want of proper railroad facilities between that valley and the nearest seaport, Buenaventura (Rec. p. 1151).

In August, 1890, the Republic of Colombia was the owner of a railroad constructed and in operation over a part of this projected route between Buenaventura and Cali. This road was completely constructed as far as Dos Quebrados (Rec. p. 1141), about sixteen and two-fifths miles from Buenaventura (Rec. p. 1142), and was in complete operation as far as Cordova (Rec. p 1140), about twelve miles from Buenaventura (Rec. p. 1141). The route of the road had also been at this time completely graded as far as Caballette, a point about eighteen miles from Buenaventura, with the exception of two cuts of about one hundred and fifty feet in length each and from twenty-three to twenty-five feet deep (Rec. p. 1142).

In this condition of affairs a contract was entered into between the Republic of Colombia and one James L. Cherry, by which said Cherry undertook to construct a railroad from Buenaventura to Manizales by way of Cali. This contract is Exhibit No. 4 with the bill (Rec. p. 26–37), and is generally spoken of in the record as "the Concession."

By the terms of said concession the railroad was divided into two sections, the first section being from Buenaventura

to Cali and the second section from Cali to Manizales (Rec. p. 27).

The present controversy arises out of the failure of the concessionary to construct the first section between Buenaventura and Cali, nothing ever having been done or attempted with reference to the second section, between Cali and Manizales.

By the terms of the second article of the concession it is provided (Rec. p. 27) that Cherry is—

> "to begin and to complete, in the first place, the construction of the first section, and upon completion thereof to begin the construction of the second section."

The first section never having been completed, of course the condition as to the second section never arose.

As to the first section the provision of the concession with reference to the time of completion is as follows (Rec. p. 27):

> "ART. 4. The construction of the road *shall be commenced formally within four months counting from the date of the execution of this contract; and the first (1st) section of the line shall be completed and opened to traffic within the peremptory period of four years counting from such date,* except in case of fortuitous circumstances or *vis major*. After beginning the work it shall be continued without interruption unless prevented by *vis major* or fortuitous circumstance and save and except the case of delays occasioned by the Government and unavoidable by the concessionary."

A guaranty to concessionary of interest at the rate of 5 per centum per annum on an agreed valuation of $38,000 gold per kilometre of new road constructed, for the period of eighteen years, was provided by article 7—the number of completed kilometres to be fixed annually (Rec. p. 28). By article 8 the guaranty of interest on that part of the road already constructed and in operation, between Buenaventura and Cordova, was to be on the basis of 5 per centum on a

valuation of $8,000 per kilometre, beginning from the time of the completion of work on the first section for so much of the period of eighteen years as remained after the completion of that section of the new road (Rec. p. 28).

By article 10 the payment of this interest was secured by one-half the gross duties collected at the custom houses on the Pacific, and drafts or bonds redeemable in such duties were to be issued by the government, while for all delay by the government in these payments the damages were liquidated and fixed at interest at the rate of 10 per centum per annum on any payments not made (Rec. p. 29).

By article 11, while only a single track was required to be laid, it was provided that the concessionary shall, nevertheless, from the beginning of the work make allowance of sufficient ground and so arrange the work that a double track can be laid whenever necessary and ordered by the mutual accord between the contracting parties (Rec. p. 29).

Article 12 of the concession required the line to be 1 metre in width between rails on its entire length and the concessionary was required to change the guage on the part already constructed from 1 yard to 1 metre (Rec. p. 29).

Article 16 exempted all importations for the railroad from duties and the railroad and its accessories from taxation (Rec. p. 30).

Article 17 fixed the term of the concession at seventy years (Rec. p. 30).

Article 29 gave the concessionary the right to take copies of all plans, gradings, and estimates already made in connection with the road owned by the government (Rec. p. 33), and, by article 33, all the road already constructed between Buenaventura and Cordova, with all its fixed plant and rolling stock, buildings, utensils, tools, cuts, gradings, accessories and appurtenances, were transferred to the concessionary during the period of the concession, gratuitously, by way of subsidy (Rec. p. 34).

Articles 34, 35, and 37, in full, are as follows:

"ART. 34. This present concession shall not be assigned to any government or foreign nation, but may be transferred to any individual, company, or corporation of a private character *upon giving notice thereof to the government of the republic*" (Rec. p. 34).

"ART. 35. The concessionary shall fix his domicile in any city in Europe or America which he may see fit to elect for such purpose; but in case he shall not select Bogotâ he shall keep at the said city an agent vested with sufficient authority to deal with the government in everything relating to this contract" (Rec. p. 34).

"ART. 37. Both the concessionary and such person or persons to whom this contratct may be assigned shall, in relation to this contract, be subject to the provisions of article 15 of Law 145 of 1888, under which such contracts as are made in Colombia between the government and foreigners, whether individuals or companies, shall be subject to the law of Colombia, and the rights and obligations springing from such contracts shall be interpreted exclusively by local judges and tribunals. In case, for any reason, the government declare the concession to be forfeited, the concessionary or whoever may represent him, shall have the right to submit the matter to the decision of two experts, one to be appointed by the government and the other by the concessionary, and such experts shall appoint an umpire for the case of disagreement. The decision of the arbitrators or of the umpire by them appointed shall be final and unappealable. All questions or matters of difference arising between the government and the concessionary in relation to this contract shall be decided upon the application of either of the parties by the Supreme Court, except in relation to the declaration of forfeiture of the concession. It is, therefore, an express condition of this contract that the concessionary shall renounce, as in fact he does renounce, the initiation of any claim by diplomatic channel relative to the rights and obligations springing from the said contract except in case of denial of justice" (Rec. p. 35).

By article 39 it was provided expressly that the concession should be forfeited by reason of a failure to comply with article 4, binding the concessionary to complete the first section within the peremptory period of four years (Rec. pp. 35–36). And the last paragraph of said article is in the following language:

> "In case of forfeiture of the concession for any of the causes hereinbefore set forth, all work that may have been done shall become the property of the nation, as well also such sums as at the date of the declaration thereof may be deposited as security by the concessionary" (Rec. p. 36).

Under the Constitution of Colombia this concession required, for its validity, the consent of the Colombian Congress (Rec. pp. 1192–3).

The concession was ratified by Congress with some modifications (Rec. pp. 36–37), which were accepted by the concessionary, as is evidenced by his request for the alteration permitted by such congressional action (Rec. p. 1211).

One of these modifications by the Congress was important, in that it gave to the executive the power, for a satisfactory reduction in the guaranty of the government upon each kilometre, to modify two parts of the contract itself (Arts. 8 and 12), in case the concessionary desired to make the whole road the width of 1 yard instead of 1 metre, but, in that event, no guaranty by way of interest was to be paid on the part of the road already constructed, which would not then require to be changed as to its guage (Rec. p. 37).

It is proper here to call especial attention to the circumstances surrounding this concession.

The approval of Congress was essential to the validity of the concession under the constitution and so appears on its face (Rec. p. 36). In no part of the concession was there reserved the right in any executive officer to modify it in any particular. The only authority for any modification was conferred by Congress in the act of ratification and

was absolutely restricted to articles 8 and 12 concerning the width of the road and the guaranty, and the right to exercise this limited modifying power was, by Congress, conferred on the executive.

The concession was dated August 27, 1890, and the work was required to be begun within four months from that day, that is, before December 27, 1890, and the first section was to be completed within four years from the date of said concession, or by August 27, 1894.

The entire length of the first section of the road being about eighty-five miles, this limitation of four years for its completion involved the construction of about twenty-one miles per annum if the work of widening the guage of the existing road from 3 feet to 1 meter was undertaken; otherwise it involved the construction of about seventeen miles per annum, the distance between the fully completed road and Cali being about sixty-nine miles (Rec. pp. 1142–1149).

Five days after the date of the concession, on September 1, 1890, Mr. Cherry addressed a communication to the Minister of Public Works of Colombia in the words following (Rec. p. 1134):

> "SIR: I have the honor to bring to the knowledge of your Excellency that for the legal effects of Article 35 of the contract I have had the satisfaction of concluding with the supreme government for the construction of the Cauca Railroad, I have constituted as my attorney in fact in this city Senor Don Victor Mallarino. The power of attorney has been executed in Notary's office Number one, in charge of Senor Don Jorge Gaitin.
>
> "Yours, &c.
>
> (Signed) "J. L. CHERRY.
>
> "BOGOTA, September 1, 1890."

On the 3d of August, 1891, Mr. Victor Mallarino, as such attorney in fact, and in pursuance of the requirements of article 34 of the concession regulating its assignment, ad-

dressed the Minister of Public Works of Colombia the following communication (Rec. p. 1212):

"BOGOTÁ, August 3, 1891.

"MR. MINISTER OF PUBLIC WORKS, PRESENT:

"I have the honor to bring to the knowledge of the Government, through the very worthy medium of Y. E., that my principal Mr. James L. Cherry, Concessionary of the Cauca Railroad, assigned the contract number 20, 'Relating to the construction of the railroad from Buenaventura to Manizales,' to a company called the 'Cauca Company,' which has assumed all the rights and obligations of the said contract. The assignment was made through a deed which Y. E. has had before him, forwarded to the Ministry on condition of its return, by Messrs. Camacho Roldán & Tamayo; executed on the sixth of April of this year, before Mr. José G. Morales, a Notary Public of New York, with all due formalities. A copy of the said deed, duly authenticated, I will shortly forwarded to Y. E.

"Mr. J. L. Cherry is charged with the management of the work of the enterprise, with full power and authority to enter into all kinds of negotiations with the Government relative to said enterprise.

"It is pleasant for me, at the same time, to add to Y. E. that the persons forming the 'Cauca Company' are of the highest respectability, one of whom is Mr. C. F. Schramme, Treasurer General of the company, who is now in this capital, duly authorized to confer with the Government in everything relating to this important enterprise.

"God preserve Y. E.

"VICTOR MALLARINO."

This is the only notice ever given to the Government of the assignment of the concession, and this fact is of the highest importance in the present case, as by the terms of the concession no assignment of it was valid unless notice thereof was given to the Government (Rec. p. 34).

Mr. Victor Mallarino continued to act as such attorney for Cherry and for the Cauca Company and to be recognized

in that character down to February, 1896, and later (Rec. pp. 1134–1135–1211–1226).

The Cauca Company referred to in said communication of August 3, 1891 (Rec. p. 1212), was incorporated in West Virginia on the 29th of November, 1890 (Rec. pp. 37–40).

An alleged assignment by Cherry to the Cauca Company of this concession is disclosed by this record, being Exhibit No. 7 with the bill (Rec. pp. 44–47), purporting to have been executed on the 29th of November, 1890, and acknowledged on the 27th of January, 1891, before one Leo G. Rosenblatt.

This alleged assignment is not the one of which Mr. Victor Mallarino gave notice to the government of Colombia on August 3, 1891, since the assignment of which he gives notice was—

> "executed on the *sixth of April* of *this year* [1891] before Mr. *José G. Morales*, a notary public of New York" (Rec. p. 1212),

and not on the *twenty-seventh of January*, 1891, before *Leo G. Rosenblatt* (Rec. pp. 37–40).

On the 29th of November, 1890, the defendant, the Colombian Construction and Improvement Company, was incorporated in West Virginia (Rec. pp. 40–44).

On the 29th of November, 1890, Cherry entered into an agreement with the Colombian Construction and Improvement Company (Rec. pp. 47–49) by which he undertook to assign to the Colombian Construction and Improvement Company all his right, title and interest in and to—

> "A certain contract entered into by him with the Cauca Company, bearing date the day of November, 1890" (Rec. p. 48).

There is no other description of the contract purporting to be assigned by this agreement than is contained in the above quotation, and no means of identifying the contract alleged to have been so assigned because its date is left blank.

The purpose of these contracts (Rec. pp. 44–47 and 47–49), between Cherry and the Cauca Company, and between Cherry and the Colombian Construction and Improvement Company, is not explained in the record, and the Republic of Colombia was never notified of the existence of either of them.

On the 27th of August, 1894, the expiration of the peremptory period of four years within which the road from Buenaventura to Cali should be completed under the terms of the concession, the road to Cali was not only not completed and open to traffic, but as late as the 16th of November, 1894, was only completed and open to traffic as far as San José, a point about five and two-fifths miles beyond the terminus of the completed road as it existed on the 27th of August, 1890, when the concession to Cherry was made.

Instead of the completed construction and opening to traffic of the road between two points 85 miles distant, the concessionary had added a trifle over five miles to the existing road, and the terminus of the road as then completed and open to traffic was still about sixty-four miles from Cali.

On this state of facts an absolute forfeiture of the concession under the provisions of article 4 had been incurred, which the government had the right to enforce unless the concessionary denied the forfeiture, when the question of forfeiture *vel non* was subject to the arbitration provided for in article 37 of the concession (Rec. p. 35).

The Cauca Company did deny that it had incurred a forfeiture of the concession. It claimed various defaults on the part of the Republic of Colombia and also set up an alleged extension of time for the completion of the construction of the road until October 18, 1896, by virtue of an agreement between the Minister of Public Works of Colombia and the attorney of the Cauca Company (Rec. p. 1216).

This agreement, as will be shown later, was utterly void. It was an attempt on the part of the executive officers without the consent of Congress to modify the terms of the concession between Cherry and the Republic of Colombia, which concession on its face required and had received the active approval of the Congress, and which approval expressly limited the executive's power of modification to the guage of the road and the consequent change in the subsidy (Rec. p. 37). This attempted action on the part of the executive officers was rejected and repudiated by the Congress on the 16th of November, 1894, by the express provisions of the law of that date, as follows:

> "ARTICLE 1ST. The Government will proceed to decree lapsed the contract of 27 of August, 1890, referring to construction of the Railroad from Buenaventura to Manizales, inasmuch as Congress does not approve of the contract 98 of 1892, carried out between the Minister of Public Works and Mr. Victor Mallarino, general representative of the Cauca Railroad Company, which deals with the extension of time for the construction of the said Railroad.
>
> "ARTICLE 2. The Government is hereby authorized to continue the construction of this Railroad by administration or by a contract which shall be submitted to the approval of Congress.
>
> "ARTICLE 3. The 50 % of the products of the Custom House of Buenaventura and Tumaco shall continue to be used for the purpose of finishing the Railroad from the Port of Buenaventura to the town of Cali in accordance with Article 10 of Contract of 18th of October, 1890.
>
> "Dated at Bogotá 16th of November, 1894.
>
> "President of the Senate ANTONIO ROLDAN; President of the House of Representatives NARCISO GARCIA MEDINA; Secretary of the Senate CAMILLO SANCHEZ; Secretary of House of Representatives MIGUEL A. PENAREDONDA.
>
> "Executive Government. Bogotá, November 16th,

1894. This decree is hereby ordered to be published and put into effect.

"(L. S.) M. A. Caro.

"The Minister of the Treasury in charge of Office of Public Works.

"MIGUEL ABADIA MENDEZ."

(Rec. p. 51).

On the 15th of March, 1895 (Rec. p. 1219), notice was given by the attorney in fact of the Cauca Company that the company, in view of the declaration of forfeiture, will make immediate use of the right granted it by article 37 of the concession, in order that the point may be decided by arbitration, and the attorney in fact adds:

> "It seems clear and even evident that the government can not assume possession of the enterprise until after the experts shall have decided, and provided that this decision should be adverse to the enterprise" (Rec. p. 1219).

Nevertheless he asked to be informed what will be the government's action in pursuance of the declaration of forfeiture (Rec. p. 1219).

In reply to this communication the Secretary of the Treasury wrote to Mr. Mallarino on March 26, 1895, expressly stating that the government will not take immediate possession of the enterprise and will only assume charge thereof *after* the tribunal of arbitrators shall have decided the question which may be submitted to their judgment pursuant to the stipulation of article 37 of the concession which Law 16 of 1890 approved (Rec. p. 1256).

In the succeeding communication to the government by the attorney in fact dated April 18, 1895 (Rec. pp. 1219–1222), Mr. Mallarino quotes a communication from Mr. Cherry in which he acknowledges a telegram dated March 26, 1895, from the attorney in fact, as follows:

"Government just communicated to me in note of

this date, as reply to my memorial that execution article one, Law 60, having become necessary government will not enter into possession enterprise until after arbitration tribunal decides" (Rec. pp. 1219–1220).

As late as November 7, 1895, it appears (Rec. pp. 1225 and 1261) that on the application of Mr. Mallarino it was resolved to extend for forty days reckoned from the 16th of November, 1895, the term established by article 2 of the executive resolution declaring forfeited the concession, in order that Mr. Cherry might exercise the right granted him by article 37 of the concesssion, pursuant to which he may request the appointment of an arbitration tribunal.

In January, 1896, the executive made a decree suspending proceedings for forfeiture until the next Congress shall decide whether or not it will authorize the government to enter into a friendly agreement with the Cauca Company (Rec. pp. 1111–1112).

In October of 1896, Law 41, Oct. 20, 1896 (Rec. pp. 53–55), was passed, giving the desired authority; the first article of this law, however, contained the following condition:

> "In *any event the condition* of the friendly settlement shall be the *renunciation* on the part of the grantee or his representative, *of the franchise granted* and the consequent and immediate delivery of the railroad and all its fixed and rolling stock, buildings, tools and other appurtenances" (Rec. p. 54).

The amicable settlement does not seem to have been immediately arrived at, and the grantee still having the right to the arbitration provided by article 37 of the original concession (Rec. p. 35), the government on the 17th of November, 1896, notified Mr. Cherry that it had nominated an expert on its part for the arbitration tribunal provided by article 37 of the concession (Rec. p. 1262).

It appears (Rec. p. 1263) that Mr. Schramme was the

expert appointed by the Cauca Company, and that on November 27, 1896, it was reported that Mr. Cherry and Mr. Schramme were shortly leaving the country (Rec. p. 1263). The government declined all responsibility in the premises, called attention to its nomination of an expert on its part, and stated that there was no difficulty of any kind for constituting the arbitration tribunal and for its fulfilling the special functions assigned to it by article 37 of the concession (Rec. pp. 1263–1264).

The arbitration provided for in article 37 of the concession, however, was not availed of by the Cauca Company.

On the 4th of January, 1897, the Secretary of the Treasury of Colombia, acting under the authority of the law of Congress of October 20, 1896, and James L. Cherry as general manager, agent, and attorney in fact of the CAUCA COMPANY, entered into an agreement for the settlement of the differences existing between the Government of Colombia and the CAUCA COMPANY, growing out of the contract for the construction of the Cauca Railway; the said agreement being the one under which the pretended award in this case is made (Rec. pp. 59–63, 1207–11.)

It is very important to notice here that the Colombian Construction and Improvement Company is not a party to this agreement, nor represented by anyone, and that the representative of the Cauca Company was acting under authority conferred by the Cauca Company and by the Cauca Company alone, and that neither in the agreement itself nor in the act of Congress authorizing the settlement is any mention made of the Colombian Construction and Improvement Company.

The final agreement for settlement of January 4, 1897, as executed, was in the Spanish language, no translation thereof into English being at the time agreed upon by any of the parties, and the literal copy of that original agreement in the Spanish text appears in the record as Exhibit No. 12 (Rec. pp. 55–59). Two translations of this document were

proved in the case—one, Exhibit No. 12 (Rec. pp. 59–63), by the testimony of Arthur W. Fergusson (Rec. p. 1136), and the other, Exhibit No. 28, A. P. (Rec. pp. 1207–1211), by the testimony of the same witness (Rec. p. 1137).

It is proper here to note that the defendants did not offer in evidence in this case any translation into English, nor any evidence as to a proper translation of this agreement for submission, upon which the award depends, and that when the complainant offered the testimony of Fergusson to prove the English translation of this document, as above stated, the counsel for the defendants objected to the evidence as being "immaterial, irrelevant, incompetent, and not within the issues" (Rec. pp. 1136–7).

In this connection it may also be observed that rule 11 of this court contemplates that, in all cases where any document proved in a case shall be in a foreign language, a translation thereof into English shall be made, either by agreement of the parties or properly proved in the court below.

The qualifications of Mr. Fergusson as a translator are shown in his testimony (Rec. pp. 1130–4), and it may be assumed that they will not be questioned, since, by stipulation of counsel on both sides (Rec. p. 1201), he was called upon to translate the only Spanish document offered in evidence by the defendants, *i. e.*, Defendants' Exhibit No. 1, A. P. (Rec. pp. 1226–9).

The translations, therefore, of the agreement for submission, proved by the complainant's testimony (Rec. pp. 59–63 and 1207–1211), are the only competent evidence in the case of any English translation of that agreement.

The agreement for submission to arbitration is one between the Republic of Colombia and the Cauca Company, and the parties to it are the Secretary of the Treasury of the Republic of Colombia on the part of the government with the authority of the Vice-President signified by his approval (Rec. pp. 59–63), and James L. Cherry as the general man-

ager, agent, and attorney in fact of the Cauca Company, and as its general attorney under the power of attorney of the 31st of December, 1890, and under special power of attorney made on the 23d of October, 1895 (Rec. p. 59). No other person or corporation than the Cauca Company is named in the instrument as in anywise interested in the controversy.

The first article declares that all pending differences are settled by means of the stipulations in the following articles (Rec. p. 60):

By the second article the Cauca Company "surrenders absolutely the concession" in fulfillment of the condition precedent to entering upon any friendly settlement contained in Law 41 of 1896.

It also agrees to deliver up the railroad within fifteen days after approval of the agreement for submission.

In consideration of this delivery of the road the Government of Colombia is to pay the company—

> "a just indemnity for all the works constructed by the company during the time the undertaking has been in its charge, and for such rolling stock and other things imported by the company for use on the railway and which are now in existence" (Rec p. 60).

By the third article both parties agree in advance to accept—

> "as the just and only indemnity a sum which shall be the equivalent of what the company shall prove it has expended on the works executed by it in the construction of said railway and for rolling stock, tools, etc., etc., imported for use on such railway" (Rec. p. 60).

The fourth article provides for the appointment of arbitrators "a special commission to be composed of three members" (Rec. p. 60).

The fifth article authorizes the Commission "to fix the indemnity already mentioned," and declares that "such

commission shall appraise the structures, works, and materials referred to" (Rec. p. 60).

The said article also provides that—

> "for such purpose and in order to thus determine the consequent indemnity the commission shall examine and consider the books and accounts of the *Cauca Company at New York*" (Rec. pp. 60–61);

that—

> "it shall inspect on the ground the works of the railroad and the rolling stock in order to make the necessary checks and verification for the determination of the facts which are to serve as a basis for fixing the indemnity" (Rec. p. 61).

The sixth article provides that:

> "Should any of the members of the Commission decline or resign from the position, or for any reason cease to act, the proceedings of the Commission shall not thereby be invalidated, but the Commission shall be restored by a new appointment, which is to be made by the party who appointed the member who fails to act, within thirty days, counting from the day on which such failure to act shall occur. If such party shall not comply with such obligation, the Secretary of State of the United States of America and the Minister of Colombia at Washington shall proceed by agreement to appoint the person to fill such vacancy" (Rec. p. 61).

The seventh article provides that the parties to the submission shall appear by person or by attorneys in fact or agents (Rec. p. 61).

The eighth article provides that the Commission shall select its place of meeting, that it shall have 150 days counting from its installation, which may be extended 60 days in case justifiable ground for delay shall arise (Rec. p. 61).

The ninth article declares for the finality of the decision and that the award shall be payable as provided in the tenth article (Rec. p. 61).

The tenth article is as follows:

> "The Government of Colombia calculating approximately that 'The Cauca Company' has disbursed in the work on the Cauca Railway the sum of about two hundred thousand dollars ($200,000)—the Company considering, however, such sum to be much less than the just price of the works executed by it—for the purpose of obtaining the immediate delivery of the Railway, in conformity with the last part of Article 1 of Law 41 of 1896, pays in advance to the Company the said sum of Two hundred thousand dollars ($200,000) in gold on account of such amount of indemnity as the Commission may fix, which sum the Company acknowledges having received from the Government of Colombia to its entire satisfaction. In case such indemnity as may be fixed in conformity with this agreement shall be greater than the sum of Two hundred thousand dollars, the Government is to pay the excess at such time, in such manner, and on such terms as may be determined by the Commission" (Rec. pp. 61–62).

The eleventh article provides for the manner of the delivery of the road (Rec. p. 62).

The twelfth article provides as follows:

> "The expenses of the personnel, mobilization and plant of the Commission shall be paid in advance in equal shares by the Company and the Government of Colombia, and the Commission shall decide whether such expenses are to be charged against one or both of the parties" (Rec. p. 62).

The thirteenth article provides that upon the performance of the award both parties shall be discharged from all liability and claims growing out of the controversy (Rec. p. 62).

The fourteenth article provides that each party shall nominate its member within eight days after the agreement (Rec. p. 62).

The fifteenth article provides that the Commission shall meet and organize at New York within sixty days after the

ratification of the agreement, which period may be extended for thirty days more (Rec. pp. 62–63).

The sixteenth, and last, article provides that the ratification of the Vice-President of the Republic shall be essential to its validity (Rec. p. 63).

After the agreement for arbitration had been executed Manuel H. Peña was appointed the member of the Commission of Arbitration on the part of the Republic of Colombia (Rec. p. 64), Christian F. Schramme on the part of the Cauca Company (Rec. pp. 64–5), and Lewis M. Haupt the third member (Rec. p. 65–66).

By reference to the stenographic report of the proceedings of the arbitrators, being Exhibits Nos. 19, 20, and 21 (Rec. pp. 72–394, 395–637, and 638–858), which were offered in evidence for the purpose of showing what had taken place before the arbitrators, and for no other purpose (Rec. p. 1168), it appears that the Commission met in New York on the 3d day of April, 1897, the government being represented by F. J. Cisneros as its agent and attorney in fact. Mr. Cisneros was not a lawyer, but a civil engineer, and the same person who had constructed the Cauca Railroad from Buenaventura to Cordova. The counsel of the government before the Commission was Mr. Roderick Robertson. The counsel for the company was Mr. Marcus Stine.

Thereafter this special Commission, required by the agreement to be composed of three members, held thirty-three other sessions, the thirty-fourth session being the last at which the three members composing the Commission met and acted together (Rec. pp. 715–31). At the thirty-fifth session the other two members of the Commission were notified by Mr. Manuel H. Peña that he had resigned to the Minister of the Treasury who appointed him (Rec. pp. 732–3), and at the so-called thirty-fifth session, or at an adjournment thereof, or at a thirty-sixth session so-called, held by Professor Haupt and Mr. Schramme, Mr. Peña positively refused to attend (Rec. p. 1270). Neither Mr.

Cisneros, the attorney in fact of Colombia, nor Mr. Robertson, its counsel, was present after said thirty-fourth session.

At said last two sessions there were present Professor Haupt, Mr. Schramme, Mr. Miller, the secretary, and Mr. Marcus Stine, the counsel for the Cauca Company, and at the last session, within a few hours of the receipt of notice of Mr. Peña's resignation, the pretended award was formulated and executed (Rec. pp. 736–47).

ASSIGNMENT OF ERRORS.

1. The court erred in its construction of the true intent and meaning of the agreement for submission to arbitration dated January 4, 1897, in the proceedings mentioned.

2. The court erred in holding that the agreement of January 4, 1897, was ambiguous in its language, or contained any technical terms to be explained by the testimony of experts.

3. The court erred in considering the conflicting statements before the Commission, not offered in evidence in this case, by persons not called as witnesses in this cause to the exclusion of the admittedly correct translation of the agreement of January 4, 1897, properly proved and uncontradicted by the evidence in this cause.

4. The court erred in not holding that the true intent and meaning of the agreement of January 4, 1897, required the arbitrators to confine their award to the sum which the Cauca Company proved it had expended on the works executed by it in the construction of the said railway and for rolling stock, tools, etc., imported for use on said railway.

5. The court erred in holding that the sum of one hun-

dred and eight thousand, one hundred and eighty-one dollars and forty-two cents ($108,181.42), part of said award, being for salaries alleged to be due to officers of the defendant corporation, the Colombian Construction and Improvement Company, by the said the Colombian Construction and Improvement Company was within the terms of the agreement of submission of January 4, 1897, and properly allowable by the arbitrators as a sum to be paid by the complainant, the Republic of Colombia, to the Cauca Company.

6. The court erred in holding that the sum of one hundred and thirty-five thousand dollars ($135,000), part of said award, being a sum alleged to be due to James L. Cherry by the Colombian Construction and Improvement Company in consideration of the assignment to it of an alleged contract between said Cherry and the Cauca Company, and in consideration of the return by said Cherry to said the Colombian Construction and Improvement Company of the sum of eight hundred thousand dollars ($800,000) of full paid stock of said the Colombian Construction and Improvement Company, was within the terms of the agreement of submission to arbitration of January 4, 1897, and properly allowed by the arbitrators as a sum to be paid by the complainant the Republic of Colombia to the Cauca Company.

7. The court erred in holding that the sum of one hundred and thirty-five thousand dollars ($135,000), part of the said award, being a sum stipulated to be paid by the Colombian Construction and Improvement Company to James L. Cherry by the certain contract between said the Colombian Construction and Improvement Company and said James L. Cherry, set forth in Exhibit No. 8 to the original bill, was within the terms of the submission to arbitrators of January 4, 1897, and was properly allowed by them as a sum to be paid by the Republic of Colombia to the Cauca Company.

8. The court erred in holding that the sum of twenty-nine thousand three hundred and eighty-six dollars and thirty cents ($29,386.30), part of said award, being a sum alleged to be the traveling expenses due from the Colombian Construction and Improvement Company to Cherry and Schramme as officers of the Colombian Construction and Improvement Company, was within the terms of the submission to arbitrators of January 4, 1897, and was properly allowed by them as a sum to be paid by the Republic of Colombia to the Cauca Company.

9. The court erred in holding that the sum of twenty-nine thousand two hundred dollars ($29,200), part of said award, being part of a sum of fifty thousand dollars ($50,000), which it is alleged was, by a resolution of the Board of Directors of the Colombian Construction and Improvement Company passed on the 15th of February, 1897, agreed to be paid to said Cherry and Schramme by said the Colombian Construction and Improvement Company for services of said Cherry and Schramme in securing the agreement of arbitration of January 4, 1897, was within the terms of the submission to arbitration of January 4, 1897, and was properly allowed as a sum to be paid by the Republic of Colombia to the Cauca Company.

10. The court erred in holding that the sum of sixteen thousand six hundred and five dollars and ten cents ($16,605.10), part of said award, being the sum alleged to be the sum of the office expenses of the Columbian Construction and Improvement Company, was within the terms of the submission to arbitration of January 4, 1897, and was properly allowed as a sum to be paid by the Republic of Colombia to the Cauca Company.

11. The court erred in holding that the sum of five thousand one hundred and twenty-two dollars and forty-eight cents ($5,122.48), part of said award, being a sum alleged

to be for sundries expended by the Colombian Construction and Improvement Company, was within the terms of the agreement of January 4, 1897, and was properly allowed as a sum to be paid by the Republic of Colombia to the Cauca Company.

12. The court erred in holding that any expenditures by or obligations of the Colombian Construction and Improvement Company were within the terms of the agreement of January 4, 1897, and in holding that the arbitrators had power and jurisdiction to allow any such as proper sums to be paid by the Republic of Colombia to the Cauca Company.

13. The court erred in holding that any of the sum of three hundred and fifty-seven thousand four hundred and four dollars and two cents ($357,404.02), part of the said award, except the sum of thirty-three thousand nine hundred and nine dollars and fourteen cents ($33,909.14), fixed by stipulation of the parties before the arbitrators, was within the terms of the submission to arbitration of January 4, 1897, and was properly allowed by said arbitrators as a sum to be paid by the Republic of Colombia to the Cauca Company.

14. The court erred in holding that the said award was valid and binding up to the sum of three hundred and fifty-seven thousand four hundred and four dollars and two cents ($357,404.02).

15. The court erred in holding that the resignation of Manuel H. Peña as a member of the Commission, and his ceasing to act as a member of the Commission, did not require the appointment of a new arbitrator under article 6 of the agreement of January 4, 1897, before any valid award could be rendered under the said agreement.

16. The court erred in holding that Peña was still a member of the Commission when the award was made.

17. The court erred in not holding the said award to be invalid because of the misconduct of Haupt and Schramme, as arbitrators, in the course of said arbitration and in the making of said award.

18. The court erred in holding that the award in these proceedings mentioned had any validity.

19. The court erred in not decreeing the said award in these proceedings mentioned to be null and void and in not decreeing the same to be delivered up to be canceled.

20. The court erred in not making the preliminary injunction as to said entire award perpetual.

21. The court erred in treating and considering any of the matters and things contained in the minutes of the arbitrators, being Exhibits Nos. 19, 20, and 21 with the original bill, as evidence in this cause for any other purpose than as showing what took place before said arbitrators.

22. The court erred in treating and considering as evidence upon the issues in this cause statements before the arbitrators not offered in evidence in this cause and made by persons not produced as witnesses in this cause.

23. The court erred in treating and considering as evidence upon the issues in this cause statements of persons before the arbitrators not offered in evidence in this cause and made by persons not produced as witnesses in this cause, and which statements had been rejected as evidence before the arbitrators by the said arbitrators themselves.

24. The court erred in decreeing interest to be due upon any part of the said award.

25. The court erred in holding that the Republic of Colombia was liable to the Cauca Company for any sum in excess of the sum of thirty-three thousand nine hundred and nine dollars and fourteen cents ($33,909.14), which the Republic of Columbia tendered itself ready to pay to the Cauca Company in the original bill herein.

26. The court erred in not awarding costs to the complainant.

27. The court erred in affirming the decree of the court below.

THE RECORD.

The somewhat unusual character of the controversy presented by this cause, the voluminous proceedings and the magnitude of the record seem to counsel to justify the liberty of a slight departure from the strict letter of rule 21 of this court as to the contents and order of briefs, to the extent of presenting a brief introductory in explanation of the record.

With the bill are filed a number of exhibits. Exhibit No. 1 (Rec. pp. 19–20) is a certificate of the Department of State of the United States that Julio Rengifo, who signed the bill, was at the time of signing *chargé d'affaires ad interim* of the Repuplic of Colombia in the United States of America. Exhibits Nos. 2 and 3 (Rec. pp. 20–25) are powers of attorney from the Cauca Company and the Colombian Construction and Improvement Company, respectively, to John B. Floyd, Esquire, made in pursuance of the statutes of West Virginia, and constituting him the attorney in fact of the respective companies authorized to accept service of process in suits affecting those companies. Exhibit No. 4 (Rec. pp. 26–37) is a translated copy of the contract between the complainant and one James L. Cherry, as amended and

authorized by the Congress of the complainant, for the construction of a railroad within the territory of Colombia, out of the alleged non-performance of which the original controversy sprung. Exhibit No. 5 (Rec. pp. 37–40) is a certified copy of the articles of incorporation of the defendant, the Cauca Company. Exhibit No. 6 (Rec. pp. 40–44) is a certified copy of the articles of incorporation of the Colombian Construction and Improvement Company. Exhibit No. 7 (Rec. pp. 44–47) is a copy of an agreement between James L. Cherry and the defendant, the Cauca Company. Exhibit No. 8 (Rec. pp. 47–49) is a copy of an agreement between Cherry and the Colombian Construction and Improvemeet Company. Exhibit No. 9 (Rec. pp. 49–51) is an affidavit in support of the averments of the bill in justification of the application for injunction. Exhibit No. 10 (Rec. p. 51) is an act of the Congress of Colombia directing the executive to proceed to declare forfeited, for alleged non-performance, the contract between the government of Colombia and Cherry. Exhibit No. 11 (Rec. pp. 52–55) is a copy of an act of the Congress of Colombia in the Spanish text, and an English translation authorizing the executive to compromise, upon the terms therein designated, the controversy growing out of the alleged non-performance of the contract set out in Exhibit No. 4. Exhibit No. 12 (Rec. pp. 55–63) is a copy of an agreement in the Spanish text and a translation thereof into English, for the submission to arbitration upon which the award in controversy is founded. Exhibits Nos. 13, 14, and 15 (Rec. pp. 64–66) are the commissions appointing the arbitrators. Exhibit No. 16 (Rec. pp. 66–68) is the alleged award, which is the subject-matter of this controversy. Exhibit No. 17 (Rec. pp. 68–69) is a copy of a voluntary release executed by the defendant, the Colombian Construction and Improvement Company, presented to the arbitrators during their proceedings by the representatives of that company. Exhibit No. 18 (Rec. p. 70) is a copy of the stipulation between the defendant, the Cauca Company, and the complainant

by their respective counsel before the arbitrators, as to the cost of construction and equipment of the railroad. Exhibits Nos. 19, 20, and 21 (Rec. pp. 72–858) constitute the stenographic report of all the proceedings before the arbitrators from their first assembling on April 3, 1897, until the rendition of the award in controversy on the 22d day of October, 1897, together with the affidavits of the secretary of the arbitrators and correspondence between him and one of the arbitrators.

Exhibit No. 22 (Rec. pp. 70–71) is an affidavit of the secretary to the arbitrators as to the accuracy of his report of their proceedings.

On the 7th of March, 1898, the defendants filed their answer (Rec. pp. 871–904), and with that answer two exhibits. Exhibit No. 1 with the answer (Rec. pp. 904–939) is the brief filed in behalf of the defendant, the Cauca Company, before the arbitrators. Exhibit No. 2 (Rec. pp. 939–1064) is the brief filed in behalf of the Republic of Colombia before the arbitrators.

Exhibits Nos. 19, 20, and 21, with the original bill (Rec. pp. 72–858), being the report of the proceedings of the arbitrators, and Exhibits Nos. 1 and 2 with the answer to the original bill (Rec. pp. 904–1064), being briefs of counsel filed before the arbitrators, cover 948 pages, or nearly three-fourths of the entire Record.

In the court below a use was made of these exhibits, which counsel for Colombia considers was not permissible.

The proper function of these papers in this case is an important question and one which will be fully considered in this brief.

With the answer to the cross-bill was filed one exhibit (Rec. pp. 1111–1112), being a copy of the resolution of the executive of Colombia to the effect that the government would take no steps looking to the enforcement of the alleged forfeiture of the contract between Colombia and Cherry (Exhibit No. 4 with the bill of complaint) until the

next Congress of the complainant should meet and determine whether or not it would authorize the executive to enter into an amicable settlement with the Cauca Company.

The testimony taken in support of the issues in this cause in behalf of the complainant will be found on pages 1116–1264, inclusive, and the testimony in behalf of the defendants on pages 1265 to 1282.

ARGUMENT.

The Jurisdiction of this Court.

A motion to dismiss this appeal for want of jurisdiction was made and submitted at this term, but the consideration thereof was postponed until the hearing on the merits. It seems proper, therefore, before entering upon the discussion of the merits, to submit anew the views of counsel for appellant in support of the jurisdiction of this court.

The ground of the motion to dismiss is "want of jurisdiction" in this court:

> "Because the judgment or decree from which the said appeal purports to have been taken is a judgment or decree of the United States Circuit Court of Appeals for the Fourth Circuit, which, under the Constitution and Laws of the United States, is final" (Motion to Dismiss, p. 1).

The only ground of jurisdiction in this court, claimed by appellant, is that which was set up and admitted as the ground of jurisdiction in the circuit court, namely, that the complainant, appellant here, is a *foreign state* under the law of nations and within the meaning of the Constitution of the United States, and that the controversy is one between citizens of a State, the appellees, and this foreign state.

The contention of counsel for appellees, in their motion

to dismiss, is that the sixth section of the act of March 3, 1891 (26 Stats. 828), makes the decree of the Circuit Court of Appeals in this case final.

The cases in which the judgments or decrees of the Circuit Courts of Appeals are made final are—

> "All cases in which the jurisdiction is dependent *entirely* upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases."
>
> 26 Stat. 828, sec. 6.

By the same section it is provided that—

> "In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." Ib.

This is not a case arising under the patent, revenue, nor criminal laws, nor a case in admiralty, nor are the opposite parties citizens of different States of this union.

To be brought within the limitations of this act, the appellant must be held to be an *alien* within the meaning of the act and the jurisdiction of the circuit court must have depended "*entirely*" upon the fact that it is an *alien*, if such it be within the meaning of the act, to the exclusion of the further fact that, whether an *alien* or not, within the meaning of this act, it is also a "*foreign state*" within the express terms of the act of Congress conferring jurisdiction upon the circuit court.

The act of August 13, 1888 (25 Stats. 433), which governed the jurisdiction of the circuit court when this bill was filed, extended the jurisdiction of the circuit court in the language of the Constitution, to controversies

"between citizens of a State and foreign states, citizens, or subjects." A citizen or subject of a foreign state would, undoubtedly, be an alien within the meaning of the Circuit Court of Appeals act and of the act of August 13, 1888, but would not be a "foreign state" within the meaning of the Constitution or of the act of August 13, 1888.

If a foreign state may be said to be an alien, as a foreign citizen or subject is, still it is a particular sort of alien, and the jurisdiction of the circuit court in such a case does not depend "*entirely*" upon the fact that it is an alien, but also on the fact that it is a special kind of alien, a "foreign state," an additional express ground of jurisdiction in the court below, under the act of August 13, 1888.

The words "*foreign state*," although used in the Constitution and in the acts of March 3, 1875 (18 Stat. 470), March 3, 1887 (24 Stat. 552), and August 13, 1888 (25 Stat. 433), in contradistinction to "citizens or subjects" of a foreign state, do not occur in the act of March 3, 1891, but the claim of appellees is that the word "aliens" in that act embraces not only the "citizens or subjects" of a "foreign state," but also the foreign state itself (Brief, pp 8–12).

"Aliens" and "foreign states" are admittedly not identical.

The Constitution describes them separately without using the word "alien" by the phrase "foreign states, citizens, or subjects" (Art. III, sec. 2), and Mr. Justice Story, in his Commentaries, recognizes the distinction in treating that clause, saying, with reference to a "foreign state" (section 1699):

> "In regard to controversies between an American and a *foreign state*, it is obvious that the suit *must*, on the one side at least, *be wholly voluntary. No foreign state can be compelled* to become a party, plaintiff, or defendant in any of our tribunals. If, therefore, it chooses to consent to the institution of any suit, it is *its consent alone* which *can give effect to the jurisdiction of the court.* It is certainly desirable to furnish some

peaceable mode of appeal in cases where any controversy may exist between an American and a foreign state sufficiently important to require the grievance to be redressed by any other mode than through the instrumentality of negotiations."

The "citizens or subjects" of a "foreign state," however, he classifies as "aliens," saying (sec. 1700):

> "The inquiry may here be made *who are to be deemed aliens* entitled to sue in the courts of the United States? The general answer is, *any person who is not a citizen of the United States.*"

In the case of Picquet *vs.* Swan, 5 Mason, 35, Mr. Justice Story judicially construes this phrase in the Constitution, saying (p. 39):

> "The Constitution of the United States has, among other things, extended the judicial power to controversies between citizens of different states, and between citizens of a state and *foreign citizens or subjects.* The actual legislation of Congress has not as yet been co-extensive with this constitutional boundary of jurisdiction. The judiciary act of 1789, Ch. 20, provides, 'that the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature where the matter in dispute, exclusive of costs, exceeds 500 dollars, and the United States are plaintiffs, or petitioners; *or an alien is a party; or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state.*' As to citizens, therefore, there exists no jurisdiction, unless either the plaintiff or the defendant is a citizen of the state where the suit is brought. As to *aliens, by which must be understood*, in the language of the Constitution, '*a foreign citizen or subject*,' the jurisdiction is in all cases given, where an *alien* is a party."

In the case of the Sapphire, 11 Wall. 164, the jurisdiction of the court to entertain a suit by a foreign sovereign (the Emperor of the French) was denied by counsel for the

appellant, but this court sustained the jurisdiction upon the sole ground that the foreign sovereign was a *foreign state*. These words the court, in its opinion, italicizes, but in the whole course of the discussion it does not even allude to the fact that Napoleon III was an *alien*. In disposing of the question Mr. Justice Bradley says (p. 167):

> "The first question raised is as to the right of the French Emperor to sue in our courts. On this point *not the slightest difficulty exists*. A *foreign sovereign*, as well as any *other foreign person*, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own Government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign can not be forced into court by suit."

Referring to the objection that the deposition of Napoleon III had the effect of abating the suit, Mr. Justice Bradley says (pp. 168–9):

> "The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the *national sovereignty*, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, *not as an individual, but as sovereign of France*. This is substantially

averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. *The foreign state* is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the *national sovereignty*. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our Government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the *French nation*."

Thus it is seen that throughout the discussion of the question of jurisdiction this court adheres to the idea that the jurisdiction rested upon the character of the party as a "*foreign state*," and no reference is made to the personal alienage of the Emperor.

In the case of Cherokee Nation *vs.* Georgia, 5 Pet. 1, this court had occasion to construe the term "foreign state" in the third article of the Constitution and, through Chief Justice Marshall, held that it was synomymous with "foreign *nation*" (5 Pet. pp. 15, 18).

In the case of Stone *vs.* South Carolina, 117 U. S. 430, this court pointed out the obvious distinction between a *state* and a *citizen* of a State.

In that case the State of South Carolina had brought suit in the State court against Stone and his partner, Corbin, for money claimed to be due from them to the State. Stone claimed the right to remove the case into the United States

court on the ground that he, Stone, was a citizen of New York. The State court denied his right to remove the case and proceeded to judgment.

In sustaining the action of the State court Mr. Chief Justice Waite, delivering the opinion of this court, said (p. 433):

> "It is not pretended that the suit was one arising under the Constitution or laws of the United States, and it *certainly is not one between citizens of different States.* The State of South Carolina is the sole plaintiff, and the defendants are citizens, one of South Carolina and the other of New York. The cause of action is joint, and only one of the defendants petitions for removal. There is no statute which authorizes the removal of a suit between a State and citizens on the ground of citizenship, for *a State can not in the nature of things be a citizen of any State.*"

In the case of The King of Spain *vs.* Oliver, 2 Wash. C. C. 429, cited by appellees (brief, p. 8), two rules were obtained by the defendant; one for the plaintiff's attorney to file his warrant of attorney; the other that the case be stayed, because the plaintiff was not qualified to sue in the court.

The objection to the plaintiff in the suit made by counsel for defendant, as stated in the report, is (p. 431):

> "The municipal courts of one country can not entertain jurisdiction of a suit brought by a foreign sovereign, more especially *one who is not acknowledged by the government of the country where the suit is brought;* and still stronger, where the sovereign in whose name the suit is brought *is not in possession of his government.*"

In disposing of this question the court said (p. 432):

> "Without going through the English cases which have been cited, it is sufficient to observe that the Constitution of the United States gives jurisdiction to the courts of the United States in cases where foreign states are parties; and the judicial act gives

> jurisdiction to the circuit courts in all cases between aliens and citizens. Whether this suit can be supported, if prosecuted *in the name of the King of Spain generally*, or whether *Ferdinand VII* can support the action *before he is acknowledged by our Government* are questions not proper to be decided on motion."

The report of the case is too meagre, it is submitted, to be treated as authority for the proposition that the court confounded as synonymous terms the words "foreign state" in the Constitution and "alien" in the judiciary act.

The inference is, rather, that the court meant to indicate that if the plaintiff was sovereign and sued in that quality the jurisdiction might be invoked as in behalf of a foreign state, and that if he was not sovereign and sued as a private person, his alienage would still support the jurisdiction.

Such a construction of the opinion makes it directly responsive to the defendant's objection, which seemed to relate, rather, to the question of *whether Ferdinand was king* than to whether the court had jurisdiction of a suit by a foreign state.

In the acts of Congress approved March 3, 1875 (18 Stat. 470), March 3, 1887 (24 Stat. 552), and of August 13, 1888 (25 Stat. 433), regulating the jurisdiction of the circuit courts, Congress uses the language of the Constitution, "between citizens of a state and *foreign states, citizens, or subjects.*"

So that the jurisdiction of the circuit court, in this case, was not based upon any legislative confounding of foreign states with alien citizens or subjects, but was based upon the words of the Constitution.

The contention of appellees that Congress, in the language of the act of March 3, 1891 (26 Stats. 826), confounded "*foreign states*" with "*aliens*," and intended to deprive this court of its appellate jurisdiction over controversies between citizens of a State and foreign states by the use of the word "aliens," is contrary to the rule of construction of that statute announced by this court.

The great object of the statute was to relieve this court of the rapidly accumulating cases which were swelling the docket to enormous and unmanageable proportions, and the remedy designed was to eliminate from its appellate jurisdiction the class of cases which were causing the difficulty.

The table of cases submitted to the Senate by Mr. Evarts in the debate upon the act (Cong. Rec., 51st Cong., 1st Sess., Vol. 21, Part 10, p. 10221), shows that in over 75 per cent of the cases then on the docket of this court the jurisdiction was dependent upon diverse *citizenship* of the parties.

In commenting upon the proposed law Mr. Evarts said in the debate in the Senate (Cong. Rec., 51st Cong., 1st Sess., Vol. 21, Part 10, p. 10222):

> "Now, *what are those cases* that we say *shall receive their final determination in this new court?* They are various cases that turn, not upon Federal jurisprudence, not upon Federal subjects-matter, but upon the *citizenship* of the plaintiff being in one State and a defendant in another, or *aliens abroad* and of citizens in our own States."

The business of this court was not congested by the accumulation of cases brought by "foreign states," so far as counsel has been able to discover in the reports of decisions by this court Indeed, the case of the Sapphire, 11 Wall. 164, is the only case in this court in which a "foreign state" was a party prior to the passage of the Circuit Court of Appeals act.

In the case of United States *vs.* American Bell Telephone Co., 159 U. S. p. 548, this court, speaking by Mr. Chief Justice Fuller, said (p. 549):

> "The Supreme Court has appellate jurisdiction, under the Constitution, in all cases to which the judicial power extends (other than those in respect to

which it has original jurisdiction) 'with such exceptions and under such regulations as the Congress shall make.' It was early held that in the passage of the judiciary act of 1789, Congress was executing the power of making exceptions to the exercise of appellate jurisdiction, and that the affirmative description of the cases to which the appellate power extended was to be understood as implying a negative on the exercise of such appellate power as was not comprehended within it, but that as this restriction rested on implication founded on the manifest intent of the legislature, it could be sustained only when that manifest intent appeared. Durousseau *vs.* United States, 6 Cranch, 307.

Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined *in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy,* bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

(p. 551): "The primary object of the act of March 3, 1891, ch. 517, as stated in American Construction Company *vs.* Jacksonville Railway Company, 148 U. S. 372, 382, 'Well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was *to relieve this court of the overburden of cases and controversies arising from the rapid growth of the country, and the steady increase of litigation;* and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals, thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States.'"

In the case of United States *vs.* Jahn, 155 U. S. 109, Mr. Chief Justice Fuller said (p. 113):

> "The act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation; but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, was sought to be amply secured and *should not be circumscribed by too narrow a construction.*"

It is submitted, that there is no just ground for contending, with reference to the Circuit Court of Appeals act, that "the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy" would in any wise be subserved by relieving the court of a branch of its appellate jurisdiction which had brought to it only one case in a century; while the manifest impolicy of denying to a foreign state, suing in the courts of the United States, the right to be heard in this court, justifies the application of the language of Mr. Chief Justice Fuller, in United States *vs.* American Bell Telephone Company, *supra*,

> (p. 554): "That there is nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnishes foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction of this court in a case such as this."

Before the hearing of this case in the court below a petition for a writ of certiorari to bring the case to this court for final hearing in advance of any hearing in the court below was submitted. This court denied the petition, but without opinion, in accordance with the usual practice in such cases (181 U. S. 619).

In making that application, the undersigned, who was of counsel for petitioner, assumed, without sufficiently careful examination of the statute, that the case was one in which the decree of the Circuit Court of Appeals would be final.

Subsequent examination of the statute satisfied counsel that he was in error in this assumption; that the case was not one in which the decree below would be final, and that the proper mode of review in this court was by appeal, as matter of right, under the statute, and not by certiorari, so that the former course was pursued by him after the decree below.

It is submitted that the contention of the appellees, in their motion to dismiss, requires "too narrow a construction" of the act, and that there is nothing in the language used or in the circumstances and conditions leading to this legislation to justify the belief that in enacting this statute Congress intended to deny to a foreign state the right of appeal to this court.

ARGUMENT ON THE MERITS.

The complex nature of this case and the number of questions arising upon the record seemed to counsel to require, for the proper safeguard of appellant's rights in the court below, a somewhat extended specifications of the errors claimed to have been committed by the circuit court (Rec. pp. 1306–10).

The opinion of the court below, announcing its decision, is somewhat unusual in its language. It is as follows (Rec. pp. 1317–18):

> "We have carefully considered the *opinion* [*sic*] of the circuit court, the *subject-matter of appeal* in these two cases. We can add nothing to the clear statement of the facts of the case made by the learned judge who delivered the opinion of the court (106 Fed. Rep. 337), and we can add nothing to the reasons which led him to his conclusion, in which conclusion we entirely concur.
>
> The decree of the circuit court is affirmed."

This opinion, merely affirming the decree without noticing any of the errors assigned, sheds no light upon any of the

questions presented by the record, and it is necessary, therefore, to assign for error here the same questions (Rec. pp. 1320–23) which were presented to, but none of which was specifically noticed by, the court below.

Though specification is made of somewhat numerous errors, many of the several errors specified are so related as to admit of being grouped and considered together in the argument.

They consist in general of—

(1) Errors in the construction and interpretation of the agreement of submission to arbitration under which the award was made.

(2) Errors in the reception and consideration of extrinsic evidence to affect the meaning and construction of the agreement for submission.

(3) Errors in holding certain specific items of the award to be within the agreement for submission.

(4) Error in holding that upon the resignation of one arbitrator the others were competent to make an award before the vacancy had been filled.

(5) Errors as to the allowance of interest and costs.

I.

Errors in the Construction and Interpretation of the Agreement for Submission.

The first, second, fourth, thirteenth, fourteenth, and twenty-fifth errors assigned.

The original agreement for submission was executed in the Spanish language, and no agreed translation of it into English was before the arbitrators, one of whom (Schramme) understood Spanish imperfectly and another (Haupt) not at all.

This circumstance naturally led to confusion and to controversies before the arbitrators, and was doubtless the principal cause of the difficulty in reaching a correct interpre-

tation as to the scope of their authority, a difficulty which was increased by suffering one of the arbitrators, Mr. Schramme, who had been a negotiator of the agreement for submission, a party in interest and a personal beneficiary of the award, to offer his statements as to the alleged oral discussions and negotiations between himself and representatives of the Government *preceding* the execution of the agreement for submission f r the purpose of determining the true intent and meaning of the submission.

No such difficulty was presented to the court below, nor to the circuit court, however, because, in this proceeding there is an English translation, made in the cause by a witness sworn for that purpose, and the accuracy of whose translation is conclusively fixed, it not having been impeached or questioned in any way.

The words of that agreement, as they appear by the translation of Mr. Fergusson, are clear and unambiguous (Rec. pp. 1207–11).

First. As to the parties. They are "the Government of Colombia" by its representative and "the Cauca Company" by its representative (Rec. p. 1207). No other persons or corporations are parties or suggested as being interested therein.

Second. As to the subject-matter. That is also plainly declared in the initial words to be the—

> "differences which have arisen between the government and 'the Cauca Company,' growing out of the contract for the construction of the Cauca Railroad" (Rec. p. 1207),

while the first article declares that (Rec. p. 1208)—

> "the Government of Colombia and the *company* compromise and declare settled all pending differences between both parties *growing out of the contract* approved by Law 16 of 1890 '*concerning the construction of the railroad* from Buenaventura to Manizales,' through the stipulations set forth in the following articles."

The "differences" between the Government and the company consisted simply in the claim on the part of the Government that the concession and the small piece of railroad constructed under it were forfeited to the Government for failure to complete within the time limited, while the company claimed to have valid excuses for its failure. The company, however, refused to submit to the arbitration provided for in article 37 of the concession, and Congress authorized the executive to enter into this form of settlement, upon the condition precedent that the company should renounce the concession (Rec. pp. 53–55).

In this connection two features of the concession are important to be borne in mind, namely: (1) that under no condition could the company secure the right to the concession without building the road, the complete construction and opening to traffic of which was the *consideration* for the concession; (2) that under no circumstances was the government liable for the *cost of construction* of the road, since that was the precise obligation of the company, the performance of which was the sole means of earning the right to the concession.

Third. As to the agreements. By the second article, the company, in compliance with the requirements of the Law 41 of October, 1896, which made the surrender of the concession *a condition precedent to any amicable settlement* (Rec. p. 54), "absolutely relinquishes" the concession (Rec. p. 1208) and also agrees that it—

> "will deliver to the Government of Colombia, *within the fifteen days following that upon which this agreement shall be approved*, the Cauca railroad with all its fixed plant and rolling stock on hand, works, buildings, tools, implements of all kinds, appurtenances, etc., etc." (Rec. p. 1208).

The government thereupon agrees, in the same article, as follows:

> "In exchange the Government of Colombia will

pay to the company a just indemnity *for the works and labors which the company may have executed during the time in which the undertaking has been in its charge, and for the rolling stock and other things it may have introduced destined for the railroad, and which at present exist*" (Rec. p. 1208).

Fourth. As to the indemnity to the company.

Here are to be observed the very important terms of the agreement.

This is not a case in which the company surrenders the concession and the road, and the government in general terms agrees to give a "just indemnity" in return, but the "just indemnity" is limited by important qualifying words.

The learned judge of the circuit court apparently lost sight of the words of limitation because, in his opinion, he says (Rec. p. 1298):

> "To indemnify is to save harmless, to reimburse, to repay *any damage sustained*."

But the "just indemnity" specified in the submission is not "to repay any damage sustained" but is for a specified thing—

> "for the *works and labors* which the company may have *executed* during the time in which the undertaking has been in its charge and *for the rolling stock and other things* it may have introduced destined for the railroad *and which at present exist*."

So particular is this agreement that in several articles this "just indemnity" is defined and limited to this specific thing. Thus, the third article provides that (Rec. p. 1208):

> "The Government of Colombia and the company recognize in advance as *just* and *sole* indemnity a sum which shall equal that which the company shall prove to have expended on *the labors and works executed by it in the construction* of the said railway and on the rolling stock, tools, etc., etc., introduced for use on the said road."

In the fifth article the arbitrators are (Rec. p. 1208) "to fix the indemnity" and to "appraise the *works, labor, and material* aforesaid."

The fifth article further provides that (Rec. pp. 1208–9):

> "For this purpose and *in order to thus fix the consequent indemnity*, the Commission *must* examine and consider the books and accounts of 'The Cauca Company' in New York, the documents which the Government of Colombia and the company may present to it in support of their respective rights, and those the said Commission shall demand; it shall *inspect, on the ground*, the *works* and *labor* of the *railroad* and the *rolling stock* in order to make the *necessary comparisons and verifications to determine the facts*, which must serve as a basis for the fixing of the indemnity, being authorized for this purpose to examine witnesses and appoint experts; it shall fix a reasonable term for hearing the parties, for considering the allegations thereof and the proofs or data they may present relative to the *determination of the works, labor*, and *material* aforesaid, to the *appraisement* THEREOF and to the *fixing of the consequent indemnity*."

In the tenth article it is stated that (Rec. pp. 1209–10):

> "The Government of Colombia, calculating approximately that 'The Cauca Company' has invested in the *work on the Cauca railroad* a sum of about two hundred thousand dollars ($200,000) (while the company considers this sum as much below the just price of the *works* and *labor* by it performed), and to the end of obtaining the immediate delivery of the railroad pursuant to the last part of Article I of Law 41 of 1896, advances to the company the said sum of two hundred thousand dollars ($200,000), gold, *on account* of the *aggregate of the indemnity the Commission may fix*, which said sum the company declares having received from the Government of Colombia to its entire satisfaction. Should the indemnity that may be fixed pursuant to this agreement be greater than the sum of two hundred

thousand dollars, the Government will pay the excess, in the time, manner, and terms the Commission may determine.

Here, it is seen, throughout the agreement for submission that the "just indemnity" is always associated with and controlled by such words as "works," "labors," "materials," "executed," and "construction" in connection with this railroad, and that the words "just indemnity" are not once used in any other connection.

Thus the company is to have a "just indemnity" "for the *works* and *labors* which the company may have *executed*," "and for *rolling stock* and other *things*" "for the railroad;" for what it has expended "on the *labors* and *works executed* by it in the *construction* of the *said railway*, and on the *rolling stock, tools*," etc.; the arbitrators are to "inspect *on the ground*, the *works* and *labor* of the *railroad* and the *rolling stock*;" to make the "necessary comparisons and verifications" with the books of account, they are to examine, and they are to consider the proofs and data of the parties "relative to the determination of the *works, labor*, and *material*," and to "the appraisement *thereof*;" and finally the government estimates the sum "invested in the *work* on the Cauca Railroad" at about $200,000, while the company estimates this as much below the "*price* of the *works* and *labor* by it *performed*."

Nor is this all. Nowhere in the entire agreement are the arbitrators authorized to consider or allow or to hear any proofs concerning any "claims" against the government, or any "losses" or "damages" or other general subject of similar character, but throughout they are restrained to ascertaining and fixing the amount of *works* and *labor* executed and materials supplied in the construction, and of rolling stock, tools, etc., used on the railroad.

It is respectfully submitted that to say, as did the learned circuit judge, that this agreement authorized the arbitrators

"to save harmless, to reimburse, to repay any damages sustained" (Rec. p. 1298) is not only to ignore the plain words of the instrument, but directly to contradict them.

Fifth. As to the arbitrators. The fourth article of the submission provides as follows (Rec. p. 1208):

> "In order to fix the indemnity of which the foregoing articles treat, the Government of Colombia and the company agree to constitute a special commission *composed of three (3) members* named thus: One by the Minister of the Treasury of Colombia, another by the attorney in fact of 'The Cauca Company,' and a third by common accord, by the Secretary of State of the United States of America and the Minister of Colombia in Washington."

The sixth article provides for keeping up the Commission, throughout its life, to this number, in the following terms (Rec. p. 1209):

> "Should *any* of the members of the commission *decline* or *resign* the charge, or *cease to act* for ANY REASON, the proceedings of the former shall not be thereby invalidated, but its *integrity shall be restored* by *new appointment*, to be made by the party naming the missing member within thirty days, reckoned from that on which such default occurs. Should such party not comply with said obligation the Secretary of State of the United States of America and the Minister of Colombia in Washington shall by common accord proceed to name the person who shall *fill the vacancy*."

It is not material to determine or to consider whether a majority could make an award, since it is established beyond dispute that before the arbitrators had completed their duties *one* of the arbitrators, Manuel H. Peña, the member appointed by Colombia, resigned and refused to act, and the other two, within a few hours, and without giving Colombia an opportunity to fill the vacancy, completed their work and made the award in controversy.

Nor is it necessary to consider the motives of Peña in so acting, since it is demonstrated that he acted without the consent or knowledge of the government, and in direct violation of its advice at a former time (Rec. p. 1106).

The controlling provision in this part of the agreement was that the party whose representative declined to act should have the opportunity to appoint a new one.

No act of the government's representative, however wrongful, if done against its wishes, or without its consent, could have the effect of depriving it of the important right of continuous representation fixed by the agreement for submission.

The learned circuit judge, while he did "not find that the complainant advised such action" (Rec. p. 1297), still considered that as Peña's conduct was, in the opinion of the court, "fraudulent in its tendencies" (Rec. p. 1297), the government was estopped to set up its right to have a substitute appointed.

It is submitted that improper conduct on the part of any one or all of the representatives of the parties or of the arbitrators, whatever other consequences it might have, could not destroy or modify the terms of the submission and defeat the requirements of the sixth article, that its "integrity shall be restored by new appointment."

Sixth. As to the evidence before the arbitrators. The agreement for submission defined the kind of evidence the arbitrators were to receive in order to fix the amount of the "just indemnity" they were authorized to award.

The fifth article of the submission provides that (Rec. pp. 1208–9):

> "For this purpose and in order to thus fix the consequent indemnity, the commission must examine and consider the *books and accounts* of 'THE CAUCA COMPANY' *in New York*, the documents which the Government of Colombia and the company may present to it in support of their respective rights, and those the said commission shall demand; it shall *in-*

> *spect, on the ground*, the *works and labor of the railroad* and the *rolling stock* in order to make the necessary comparisons and verifications to determine the facts, which must serve as a basis for the fixing of the indemity, being authorized *for this purpose* to examine witnesses and appoint experts; it shall fix a reasonable term for hearing the parties, for considering the allegations thereof and the proofs or data they may present *relative to the determination of the works, labor, and material aforesaid, to the appraisement thereof* and to the fixing of the consequent indemnity."

It is to be remembered that the Cauca Company and the Government were the only parties to this submission, and it was the transactions of the Cauca Company alone which were the subject of the inquiry.

As by the third article, the "sole indemnity" was to be the "sum which shall equal that which the company shall prove to have expended" (Rec. p. 1208); it was reasonable and proper that the arbitrators should be required, as provided in the fifth article, to "examine and consider the books and accounts of 'the Cauca Company'" (Rec. p. 1208), the party whose expenditures were to be ascertained.

And why "the books and accounts" "*in New York?*"

Was there reason for specifying not only "the books and accounts of 'the Cauca Company,'" but also specifying that they should be those "in New York?"

There was special reason for this precise requirement.

As will appear by reference to the proceedings before the arbitrators, when the examination of books was in progress, one Edward Blum, produced for the company, stated that he had been in charge of the office at Buenaventura; that the original books were kept at Buenaventura, and had been burned in January, 1896 (Rec. p. 117). Alleged copies of these books kept at Buenaventura up to 1893, and alleged copies taken from separate sheets alleged to have been sent from there to New York, were received as evidence by the arbitrators (Rec. pp. 117–119).

The introduction of these books before the arbitrators was objected to—but the objection was overruled and these copies of copies were admitted, though the parties producing them covered them with mystery and suspicion (Rec. pp. 117–121).

In the testimony in this cause (Rec. p. 1223) it appears that in August, 1895, the government was seeking access to the Cauca Company's books and that in a letter to the government, the books now said to have been burned in Buenaventura, in January, 1896, were then represented by the company to be in New York.

On August 27, 1895, the government wrote, expressing the desire to examine the books of account of construction of the railroad, and asked "where the said original accounts are to be found" (Rec. pp. 1258–9).

Mr. Mallarino, the agent of the Cauca Company, on August 30, 1895, replying to the statement of the Minister of Public Works that it has been impossible to verify the examination of the accounts of the Cauca Railroad because the accounting department was not at Buenaventura, says: "It is therefore *in New York* where *the original accounts are to be found*" (Rec. p. 1223).

On August 31, 1895, the government wrote that:

> "It is hoped that you will be pleased to inform the Ministry of the address of the office in New York where the books of the *Cauca Company are kept*, and the person who should officially furnish the data the Commissioner of the Government may need for the examination of the accounts" (Rec. pp. 1259–60).

On the 6th of September, 1895, Mr. Mallarino replies that the—

> "Address of the office is 57 Broadway, New York, C. F. Schramme, Secretary and Treasurer" (Rec. p. 1224).

On September 30, 1895, Mr. Mallarino transmits to the government the following telegram from Cherry to him:

> "Replying to your telegram of the 25th, please inform the government that the *books of account of the company* are at the disposal of the commissioner which the government may name, *in New York*. (signed) James L. Cherry per Edward Blum" (Rec. p. 1225).

In the further proceedings before the arbitrators it appeared that the books produced were not even copies of original books of the *Cauca Company*, the party to the arbitration agreement, but were alleged copies of books of the *Colombian Construction and Improvement Company*, a company not a party to the arbitration and having no relations with the Colombian Government at any time (Rec. pp. 150–2), and that the Cauca Company, whose "books and accounts" "in New York" the arbitrators were to examine, *never had any books* (Rec. p. 152), notwithstanding the representations contained in the foregoing letters.

It also appeared before the arbitrators on the *10th of June, 1897*, that the books alleged to have been kept by the Colombian Construction and Improvement Company in New York were originally opened and kept by one Robert R. Bower, at the time of this arbitration engaged in serving a term in the State's prison, where he had been for the past *two or three years* (Rec. p. 150), i. e., since June 1895 or 1894.

Mr. Haupt's reason for uniting with Mr. Schramme in receiving these books appears to have been that he considered the Colombian Construction and Improvement Company as a party in interest, whose claims were entitled to be considered, because he states in his testimony that—

> "As the record shows the Colombian Construction Company did not appear as a party in the title *but as party in fact*" (Rec. p. 1277).

It appears, therefore, that there were the best of reasons

for requiring an examination of "the books and accounts of the Cauca Company," and that these books should be the ones which the company had represented to the government were "in New York," and not the copies of alleged books of another company, *a stranger to the arbitration.*

The learned judge of the circuit court certainly overlooked these facts, else he could not have asked, as he does in his opinion (Rec. p. 1298):

> "If the commission in ascertaining the indemnity had been limited to the actual local cost of the railway, why was it necessary to consider the books of the Cauca Company at New York?"

It was not, as the learned judge seemed to think, in order to ascertain *expenditures* in New York, not pertaining to local construction, that the books in that city were to be examined, but it was for the very obvious reason that the government, at the time of entering into this agreement for submission, had in its possession the written assurance of the concessionary, Cherry, and of the company's agent, Victor Mallarino, that the original accounts of local construction were kept in New York, and not in Colombia.

As will be shown later on, every disputed item in this award is made up, not from the "books and accounts of the Cauca Company in New York," as provided by the submission, but from the alleged books, or alleged copies of books, of the Colombian Construction and Improvement Company, and these items do not even purport to be the expenditures of the Cauca Company, but the alleged expenditures of the Colombian Construction and Improvement Company, a stranger to the arbitration.

It is submitted that the learned judge entirely misconceived the true scope and the important limitations of the agreement for submission as to all its essential requirements.

II.

Errors in the Reception and Consideration of Extrinsic Evidence to Affect the Construction of the Agreement for Submission.

The third, twenty-first, twenty-second, and twenty-third errors assigned.

The chief issue in this cause is the true construction of the terms and scope of the agreement for submission to arbitration. With respect to all questions of fact within the terms of a voluntary, extra judicial submission, and therefore within the jurisdiction of the arbitrators, their decision is, generally speaking, conclusive, and not subject to re-examination by a court.

With respect, however, to the true construction of the agreement for submission, as to what is and what is not within the jurisdiction of the arbitrators, their decision is not only not conclusive, but is wholly immaterial, because that is a question which the court must examine and determine *de novo*, by its own methods, according to the rules of law governing the interpretation and construction of written contracts.

A voluntary submission to arbitration is a contract.

> District of Columbia *vs.* Bailey, 171 U. S. 161, 171.

The rule is well stated by the Supreme Court of Maine in the case of Sawyer *vs.* Freeman, 35 Me. 546:

> "The decision of the arbitrators, that a matter does come within the terms of the submission, can not be conclusive of the fact. If it could, all matters would be included which they pleased to consider to be so, however at variance with the terms of the submission and contrary to the intent of the parties to it."

The true intent and meaning, therefore, of the submission are to be ascertained, if by any extraneous circumstances,

from the facts and circumstances existing at the time the submission to arbitration was entered into, and established by competent evidence *in this cause*, and not by reference to extra-judicial and unsworn allegations, especially as to preliminary negotiations, bases of agreement, discussions, claims and counter-claims of the parties, as to the matters to which the proposed submission should extend, for all these are, by the settled rules of law, merged, superseded, abrogated, and utterly annulled by the ultimate written agreement which the parties signed.

In Van Ness *vs.* The City of Washington, 4 Pet. 232, Mr. Justice Story, delivering the opinion of the court, says (p. 284):

> "We must take the indenture, therefore, as we find it, as a complete execution of the preliminary agreement, and as expressing the true intent and definitive objects of the parties. The preliminary agreement then became, upon the execution of the indenture, functus officio, and was merged in the more formal and solemn stipulations of the latter."
>
> . . . . . .
>
> "Here we have a solemn instrument embodying the final intentions and agreements of the parties, without any allegation of mistake; and we are to construe that instrument according to the legal import of its terms."

And again he says (p. 285):

> "It has been said that by looking at the preliminary agreement, the court will see that terms of a more limited nature are there used. Be it so. But will that justify the court in resorting to it to explain or limit the legal import of words in a solemn instrument, which contains no reference to it? If we could resort to it, the natural conclusion would be, in the absence of all contrary proof, that the last instrument embodied the real intent of the parties; that the preliminary agreement either imperfectly expressed their intent, or was designedly modified in the final act.

> The general rule of law is, that all preliminary negotiations and agreements are to be deemed merged in the final settled instruments executed by the parties, unless a clear mistake be established."

In Emerson *vs.* Slater, 22 How. 28, the court, by Mr. Justice Clifford, says (p. 41):

> "Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the written contract."

In Oelricks *vs.* Ford, 23 How. 49, Mr. Justice Nelson, delivering the opinion of the court, says (p. 64):

> "It was also urged on the argument that this contract was entered into between the defendants and the agent of the plaintiff, with the understanding at the time that it should be subject to the usage; but the answer to this is, that no such usage existed; and if it did, the terms of the contract exclude it. Any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence inadmissible to engraft them upon it."

In The Delaware, 14 Wall. 579, Mr. Justice Clifford, speaking for the court, says (p. 603):

> "Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms or to affect its construction, as all such verbal agreements are considered as merged in the written contract."

In Bast *vs.* Bank, 101 U. S. 93, Chief Justice Waite delivering the opinion, says (p. 96):

> "2. As to the parol evidence.
>
> "No principle of evidence is better settled at the common law than that when persons put their con-

tracts in writing, it is, in the absence of fraud, accident, or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.' 1 Greenl. Evid., sec. 275. In Pennsylvania the stringency of this rule has been very considerably relaxed, but we have been referred to no case where, in the absence of fraud or mistake, parol evidence has been admitted to alter the plain and unequivocal terms of a written instrument. In *Martin* v. *Berens* (67 Pa. St. 463) the court say: 'Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative.' In this case the Pennsylvania decisions are extensively reviewed, and the exceptions to the rule of the common law which they recognize carefully stated, but the conclusion is that 'as a general rule, it (parol evidence) is inadmissible to contradict or vary the terms of a written instrument.' Again in *Bernhart* v. *Riddle* (29 id. 96) this language is used: 'Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their minds. What if parol evidence prove, never so clearly, that they used such and such words in making their bargain; the writing signed, if it contain not those words, is final and conclusive evidence that they were set aside in favor of the other expressions that *are* found in the written instrument. And hence this rule of law is only a conclusion of reason, that that medium of proof is most trustworthy which is most precise, deliberate, and unchangeable.'"

In Ruggles *vs.* Illinois, 108 U. S. 526, the court, by Chief Justice Waite, said (p. 534):

> "But Vattel's first general maxim of interpretation is that 'it is not allowable to interpret what has no need of interpretation,' and he continues: 'When a deed is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it.' Vattel's Law of Nations, 244. Here the words are plain and interpret themselves."

Palmer *vs.* Green, 6 Conn. 14 (1825), was an action on book debt brought by plaintiff as executor for the settlement of partnership accounts. At trial defendants adduced in evidence a submission between plaintiff's testator and defendant Green of all their book accounts and a certain note payable by Green, and an award of arbitrators referring to such submission. Defendants then offered to prove, by one of the arbitrators, that it was agreed by parol between Palmer and Green that the arbitrators should also take into consideration the company accounts of defendants with Palmer, which arbitrators accordingly did and included them in their award. This testimony was rejected by lower court.

Hosmer, C. J., says (p. 18):

> "The parties submitted their controversy in writing; and parol testimony was offered to show an enlargement of the powers of the arbitrators, including a subject not mentioned in the written submission. The offered testimony was rejected by the judge. From the motion it does not appear that the parties *first* made a written submission, and *afterwards* by parol conferred additional powers; but it is merely said, that 'the defendants offered to prove by the testimony of Comstock Chapel, that *it was also agreed*, without specifying *when* such agreement was made; and it is perfectly compatible with the statement that the written submission and the supposed agreement by parol were contemporaneous. If such were the fact, the testimony by parol could not be

> received without varying the effects of the written submission, which must be presumed to comprise the whole intention of the parties.' *Kyd on Awards*, 141, 149.
>
> . . . . . .
>
> As it does not appear that there was any such submission by parol, *subsequent* to the one in writing, . . . the testimony offered was rightly rejected."

De Long *vs.* Stanton, 9 Johns. 38 (1812), was an action of covenant on a bond conditioned for the performance of an award. Plaintiff and defendant entered into bonds of arbitration, conditioned to perform the award of arbitrators upon every cause of action, controversy, demand, etc., both in law and equity, existing at any time or times theretofore. Under this submission the arbitrators made an award in favor of plaintiff.

On the trial of the cause counsel for defendant offered to prove, in bar of the plaintiff's recovery, that at the time the parties submitted their disputes to arbitrators there were only two disputes or controversies which had arisen and were then depending between them; one an indictment for forcible entry and detainer found against defendant on prosecution of plaintiff; the other an action of trespass by plaintiff against defendant; that on the hearing before the arbitrators plaintiff produced testimony to prove that defendant had been guilty of fraud in the sale of a farm to him some years before, by misrepresenting its value, and claimed damages for the injury he had sustained by the alleged fraud. That defendant's counsel had objected to the introduction of such testimony, but it was admitted by the arbitrators, who founded their award in part upon that evidence, that a considerable portion of the sum awarded to be paid by defendant was intended by them as compensation to plaintiff for the damages sustained by such pretended fraud.

To the offer of this evidence the plaintiff objected, con-

tending that the facts, if true, formed no bar to the plaintiff's recovery, and the evidence was overruled by the trial court and the jury instructed to find a verdict for plaintiff.

On motion for new trial the court said (p. 42):

> "The submission in this case was general and embraced 'every demand and cause of action, in law or equity.' No language could have been more comprehensive. If the allegation of fraud in the sale of the farm was true in fact, it was a cause of action embraced by the submission. . . . Parol evidence is not admissible to limit the extent of the submission, and to show that it was confined to matters actually in *dispute* or *controversy*: for this would be to contradict the bond."

Efner *vs.* Shaw, 2 Wend. 567 (1829), was an action on a written instrument providing for the valuation of certain building work by two appraisers and that the parties would abide their decision. At the trial, after the plaintiff had proved the appraisement as provided for in the instrument, the defendant offered to prove that the object of the submission was only to determine whether the work done on the building, variant from the original plan, was worth more or less than the price originally agreed on between the parties. The evidence was objected to and rejected. In affirming the court below, Sutherland, J., said (p. 569):

> "The evidence offered by the defendant, and rejected by the court was properly excluded. A part of it went directly to vary the terms of the written submission, which was clearly inadmissible (9 Johns. R. 38)."

In Billington *vs.* Sprague, 22 Me. 34, a cause was pending in court and the parties, by their counsel, entered into a written agreement that the case be referred to three arbitrators. By the terms of *that* writing, all three would have been required to agree to render a valid award.

In the actual order of reference, however, made by the

clerk of the court under the authority of the written agreement, the clerk provided that a "major part" of them should make a valid award.

It was sought to qualify the actual submission by the terms of the written agreement to submit. The court, in holding this evidence inadmissible, said (p. 44):

> "The memorandum, however, from which the entry on the docket of the agreement to refer was made, and to which no reference is made in such entry, can not be regarded as in anywise affecting the construction thereof.
>
> "A memorandum of an agreement, made out of court, to refer, and subsequently carried into effect by an entry in court, and under its sanction, on the docket, is thereby wholly superseded, as much so as if it had never existed. The question then depends upon the construction to be put upon the entry upon the docket."

Loring *vs.* Alden, 3 Metcalf, 576, was an action of assumpsit to recover the amount awarded by arbitrators. The parties had entered into a written submission to three persons with power in the majority to make an award. A *previous* oral agreement to submit to two arbitrators with power in case of disagreement to choose a third was proved. Only two of the arbitrators met and heard the parties and rendered the award; the third never took part in the proceedings.

Wilde, J., delivering the opinion of the court, says (p. 578):

The verbal agreement "was suspended and merged in the written submission."

And again (p. 580):

> "But this parol agreement was not made after the one in writing and was consequently superseded thereby, and not binding on the parties."

And on page 581:

> "We are of opinion, therefore, that as the proceed-

> ings of the arbitrators were irregular and were not in pursuance of the submission, the award is not binding and the action can not be maintained."

In District of Columbia *vs.* Bailey, 171 U. S. 161, evidence was given, under objection and exception, as to what was the intention of the parties to the submission, for the purpose of affecting the construction and interpretation of the written submission. With reference to that class of evidence the court said, through Mr. Justice White (p. 178):

> "We have considered what has been referred to by counsel as the order of the Commissioners, *according to its terms*, which embraced only the matters contained in the action then pending, *and have not regarded the parol evidence*, which sought *to vary and contradict the writing* by establishing that it was *intended thereby* to embrace a claim which had not been asserted in the action."

In reaching his conclusions as to the true intent and meaning of this agreement for submission, as is shown in his opinion, the circuit judge considered alleged acts and declarations of and negotiations with representatives of the government, antecedent to the execution of the submission, as affecting the interpretation and construction of the submission itself, all of which were incompetent under the foregoing rules.

As will be shown, later, all these alleged acts, declarations, and negotiations, received and considered by the circuit judge, rest upon *ex parte* hearsay statements, not under oath and never offered in evidence in this cause, being matters which were alleged in behalf of the company before the arbitrators.

Under the circumstances of this case none of these matters was competent to be considered for any purpose except as showing what actually took place before the arbitrators. Attention has already been invited to the various documents composing this record, and to the fact that about

three-fourths of this entire record consists of the report of the matters which occurred in the proceedings before the arbitrators, and that in the opinion of counsel for appellant an improper use was made by the circuit court of these exhibits.

It is appropriate here to explain why these exhibits are in the record and the manner in which they were brought into the case.

By an inspection of the award (Ex. 16 to Bill, pp. 66–67), it will be seen that the award does not disclose any item of which it is composed, except the fee of $10,000 to Marcus Stine, the counsel for defendant, the Cauca Company, under whose direction and supervision the award was drawn. In order to show that the arbitrators had exceeded their authority, what they had allowed and how they had proceeded, it was necessary to show to the court, in detail so far as possible, all their acts. They having made a record of all their proceedings showing what they had done, what they had considered and allowed, the grounds upon which they had proceeded, and, in short, all that had entered into the formation of the award, the natural, proper and most just source of information was in the record they had preserved of their own proceedings. It was for this reason alone that the proceedings of the arbitrators were competent for any purpose, and the only purpose for which they were competent was to show what took place before and was done by the arbitrators.

It was for this purpose they were filed as exhibits to the bill, that the court might see from their own record of their proceedings precisely what had taken place. The 30th paragraph of the bill introduces these exhibits as follows:

> 30. "Your orator further shows that the said Commission provided for the stenographic report and printing of all the proceedings had before them, and that the same have been fully and completely reported, transcribed and printed, and a copy of said report, duly certified by the Secretary of the said Commission, and the accuracy of which is verified

> by his affidavits, is herewith filed. The said report is in three volumes, marked Complainant's Exhibits Nos. 19, 20 and 21, which it is prayed may be taken and read as a part of this bill of complaint" (Rec. pp. 13, 14).

As the minutes of the arbitrators could not prove themselves their accuracy was formally proved by complainant, and they were then formally offered in evidence for the limited purpose for which alone they were competent and admissible, and defendants were then notified that these minutes were in evidence for this definite and limited purpose and none other.

They were offered "for the sole purpose of showing that these matters and things therein set forth took place" (Rec. p. 1168).

To this offer, for this limited purpose, no objection was made, counsel for defendants saying:

> "To the *offer made by the counsel for the complainant*, counsel for defendants *do not object*, reserving the right to make certain minor objections, additions and emendations, the tenor and purport of which appear in the proceedings and in the answer" (Rec. p. 1168).

It is to be observed that the assent of counsel for the defendants is not to the reception in evidence of this record of the arbitrator's proceedings, but *in terms* to the *form of offer made by the counsel for the complainant*, which was obviously, carefully, and designedly made for the restricted purpose stated.

It would violate the most fundamental principle in the conduct of trials if any other scope were given to the complainant's action. The complainant was bound to show the course of proceedings of the arbitrators. This might have been shown, to some extent, by the testimony of the secretary or of the arbitrators themselves, but in the nature of things, the whole matter being stenographically taken down and a

record made thereof, the memory of any witness as to the events taking place would have been far less reliable, and the course pursued was undeniably the proper one in order to place fairly before the court the course of procedure and conduct of the arbitrators.

The truth or falsity of any statements made before the arbitrators, by any persons, was wholly immaterial, the inquiry being merely as to what had been said or done.

If, in the course of these proceedings, it became necessary to establish as a fact any matter detailed before the arbitrators it was, of course, necessary to establish it by the use of competent, sworn testimony in this cause.

To hold that by offering this record of the proceedings before the arbitrators, for the purpose for which it was offered, and which purpose was at the time assented to by counsel on the other side, the complainant thereby made said record evidence of any of the facts therein set out, would be as unreasonable, as unjust, and as absurd as to hold that in an action for libel, where the defense was the truth of the libel, the plaintiff would establish the truth of the libel by proving the libelous words and their publication.

In Marine Insurance Co. *vs.* Hodgson, 7 Cr. 206, the court, by Mr. Justice Livingston, said (p. 220):

> "If all the proceedings in the admiralty had been read by the plaintiff without any previous agreement, on the part of the defendants, to save every objection to their contents, excepting the matter of authentication, the court will not say that the defendants might not have insisted on using any deposition, among the papers, which made in their favour; but, as the plaintiff could have read them for no other purpose than to prove the libel and condemnation, and must have attempted to prove no other fact by them, *for which purpose it is expressly stated that they were offered*, and as the defendants had by their agreement explicitly reserved to themselves

> every objection to their contents it does not appear reasonable to permit them to select a deposition, as evidence for them, while the plaintiff could not have made use of that, or any other, if ever so favourable to himself."

In the case at bar the complainant had precluded itself, by the form of its offer, from using any part of these exhibits even if they were competent, for any other purpose than to show the character of the proceedings before the arbitrators, to which restriction defendants gave their express assent (Rec. p. 1168).

It is clear, therefore, that the defendants can not be permitted to use, for their own benefit, evidence which they did not themselves offer for any purpose and which the complainant has no right to use in its own behalf.

In Tappan *vs.* Beardsley, 10 Wall. 427, Mr. Justice Miller delivering the opinion of the court said (p. 435):

> "As to Taylor's deposition, *the fact that he was a competent witness in the present suit and could have been used by the plaintiff as such, is sufficient to exclude his deposition taken in another suit*, even if Tappan had been a party to that suit."
>
> . . . . . .
>
> "When one party introduces and reads from such a record *that which suits his purpose*, the other party may read for his own benefit all that relates *to that subject*, or require the party introducing the record to do so. *But we know of no rule which, because a party may use a record or part of it to establish a fact that can only be established by record, authorizes the same party to use everything else which may be found in the record, however irrelevant to the issue on trial, or however it may violate other well-established principles of the law of evidence.*"

These exhibits therefore are only in the case as evidence of what took place before and was done by the arbitrators under the agreement of January 4, 1897.

As independent evidence of the facts to which it relates, the so-called "testimony" or "evidence," before the arbitrators, was not offered and would of course not have been admissible, if offered, being purely hearsay.

In order to be admissible, the so-called "evidence" or "testimony" must have been given *under oath in a judicial proceeding* and the witnesses must either be dead, disqualified or out of the jurisdiction of the court.

1 Greenl. Ev. (15th ed.) sec. 163.

None of these conditions existed. The proceeding was not judicial and the arbitrators possessed no judicial character. The witnesses were not under oath; there was no person present legally qualified to administer an oath and no tribunal before which an oath could be administered. It does not appear that any witness, except Cisneros, is dead or beyond the jurisdiction of the court.

So far as the defendants are concerned they did not offer in evidence any of said exhibits for any purpose, and if they contain any matter which would be admissible, which is denied, it has never been offered. These exhibits present, therefore, simply the evidence of what took place before and was done by the arbitrators, and are evidence of nothing else.

As none of this so-called testimony was offered in evidence by the defendants during the taking of testimony its reception and consideration by the court placed complainant at a great disadvantage. It is proper, therefore, to submit some further observations as to the inadmissibility of the evidence, and also upon the proposition that if it were admissible it can not be considered, because never offered against the complainant.

The general principle will not be denied that statements by persons not under oath and not subject to cross-examination in the very case in which the statements are sought to be used as evidence are hearsay and inadmissible, and to

become admissible such statements must fall within some recognized exception to the rule.

An exception to the rule exists in the case of the testimony of a witness given under oath and subject to cross-examination, in a former judicial proceeding, between the same parties; but even in such a case the evidence is not admissible unless the witness be dead, or to use the largest latitude allowed in any case, incapable of being produced at the trial.

Careful research has failed to disclose any principle in any text-book or any decision of any court which would render the so-called testimony of witnesses before the arbitrators competent in this cause for any other purpose than to show what took place before the arbitrators.

The Witnesses Were Not Under Oath.

By reference to the record it will appear that it is stated that the chairman, Mr. Haupt, "administered the usual oath of affirmation" (Rec. pp. 255, 429, 475, 546, 575), or that "the oath of affirmation having been duly administered" (Rec. p. 116) or "the usual oath having been administered" (Rec. p. 147) or "The chairman administered the usual oath" (Rec. p. 151) and similar expressions precede the so-called testimony of each person appearing.

Just what the "usual oath" was is not disclosed nor how or when it became "usual," except that it appears that the second "witness" appearing was subjected to the "usual oath" (Rec. p. 151).

The legal evidence in this case shows (Rec. p. 1267) that Mr. Haupt was a civil engineer and subsequently became a member of the Nicaraguan Canal Commission, and though he was called upon to give a somewhat extended description of his career and the positions he occupied, he testified to no fact which would empower him to administer an oath. As arbitrator neither he nor any one of his associates nor all of them together had any such power. It could hardly

be contended otherwise, but this lack of power is definitely declared in the text books and in adjudged cases.

"At common law, *an arbitrator can not administer an oath*. His power to do so can be obtained only by virtue of specific statutory enactments."

Morse on Arbitration, p. 131.

"If the arbitrators, or attorneys of the parties in the presence of the arbitrators, undertake to swear the witnesses, though having in fact no legal authority to do so, they will not thereby render their proceedings invalid. If the absence of a binding oath is not a fatal omission, the administering one not binding will be immaterial. *Such an oath would be a mere nullity*, and the witness testifying falsely could not be punished for perjury."

Id., pp. 132–133.

"As before the modern statutes the arbitrator had no power to administer an oath (Street *vs.* Rigby, 6 Ves. Jr. 815; Wellington *vs.* Mackintosh, 2 Atk. 569; Halfhide *vs.* Fenning, 2 Bro. C. C. 336), it was usual when a cause was referred at nisi prius, and the witnesses were in court, to have them sworn in court."

Russell on Arbitrators (5th ed.), sec. 179.

"Under 14 and 15 Vict., ch. 99, sec. 16, arbitrators have power to administer oaths. Previous to this statute if an arbitrator administered an oath to witness and witness swore falsely before him, the latter could not be punished for perjury. R. *vs.* Hallett, 20 L. J. M. C. 197."

Ib., sec. 179.

In England in 1851 express authority was given by statute to arbitrators to administer a valid oath to witnesses.

14 and 15 Vict., ch. 99, sec. 16, provides:

"XVI. Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter

> having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

Mr. Justice Story, in the case of Tobey *vs.* The County of Bristol, 3 Story, 800, says (p. 822):

> "Now we all know that arbitrators, at common law, possess no authority whatsoever, even to administer an oath or to compel the attendance of witnesses."

In People *vs.* Townsend, 5 How. Pr. 315, Townsend was indicted for perjury in having sworn falsely in a proceeding before arbitrators. In holding the conviction invalid and the indictment bad, Welles, Ch. J., says (p. 316):

> "Various legal objections are now taken to a conviction under these circumstances; but we will notice only two of them, as they appear to us decisive of the whole case.
>
> "1st. Had the arbitrators power to administer an oath to the defendant? because if they had not, the oath was extra-judicial and legal perjury could not be committed under it. This must depend upon the question whether the arbitration was under the statute or at common law, as they have not such power except in the case provided by the statute (2 R. S. 541, 3d ed. 628, secs. 1 to 5, inclusive). Under a common law arbitration, arbitrators do not possess such power.
>
> . . . . . .
>
> "An oath administered by them would impose no more obligation upon the defendant than if administered by an overseer of highways."

In Regina *vs.* Hallett, 20 L. J. M. C. 197, decided in the court for Crown Cases Reserved, *coram* Lord Campbell, C. J., Alderson, B., Coleridge, J., Platt, B., and Talford, J., the defendant was convicted of perjury in a magistrate's court for false statements made before an arbitrator in a cause

referred by the judge of a county court under the provisions of the statute 9 and 10 Vict., ch. 95, the arbitrator going through the form of administering an oath.

Lord Campbell, C. J., delivering the opinion of the court, says (p. 198):

> "It was very fitting that this point should have been brought before us, though I have no doubt at all upon it. The question turns entirely on the effect of the 77th section of the County Courts Act, 9 & 10 Vict., c. 95; for it must be conceded that there is nothing in the statute 1 & 2 Will. 4 c. 42, or in any other statute that gives to an arbitrator nominated under this act the power to administer an oath. This section empowers the county court judge to refer matters to arbitration with the consent of the parties, that is, it merely allows of an arbitration under authority of the court. It does not, in my opinion, give the arbitrator any power to administer an oath. And in this position arbitrators stood universally before the statute of Will. 4 was passed. They had authority to examine the witnesses and determine the matters referred, but they had no power to administer an oath. Whenever power has been given to any person to decide on matters contrary to the course of the common law, and it has been intended that evidence should be given upon oath taken before the party, the power of administering an oath has been expressly given by the statute, accompanied by a declaration that false swearing shall be perjury. There is no such provision here. I think, therefore, that the arbitrator appointed by the order of the county court has no more power of administering oaths than an arbitrator acting under a rule of one of the superior courts had before the statute of Will. 4, c. 42. The false swearing, therefore, before the arbitrator in this case was not perjury."

In Wellington *vs.* Macintosh, 2 Atk. 569 (1743), to a bill to discover and be relieved against frauds brought by one partner against another, the defendant pleaded a previous agreement to arbitrate. The Lord Chancellor, Ld. Hard-

wicke, disallowed the plea, on the ground that the arbitrator could not examine the party upon oath, saying (p. 570):

> "But this is a bill to discover and be relieved against frauds, impositions, and concealments, for which the arbitrators could not examine the parties on oath."

Lord Hardwicke, however, says that this power could have been conferred on the arbitrators by a clause in the agreement. But as to this, in Halfhide *vs.* Fenning, 2 Bro. C. C. 337 (1788) the Master of the Rolls (afterwards Ld. Ch. Justice Kenyon) remarked that Ld. Hardwicke must have been misreported "as the parties could not give the arbitrators such a power."

In Street *vs.* Rigby, 6 Ves. Jr., 815–818 (1802) Lord Eldon says:

> "The Court, if it is not part of the agreement, can not give them [the arbitrators] authority to examine upon oath; and the agreement itself can not authorize any person to administer an oath."

Statements of Witnesses in a Common Law Arbitration are Not Admissible in Evidence in Judicial Proceedings.

In Jessup *vs.* Cook, 6 N. J. Law (1 Halst.), 529, the testimony of a witness then dead, given before the arbitrators, between the same parties and relating to the same subject-matter, was offered. But the court rejected the same as inadmissible, saying (p. 534):

> "To prove the fact that the credit given to Clinton was given by Jessup personally, the defendant offered to read the testimony of a witness who had been examined on a previous investigation of the cause before arbitrators, from notes of his testimony taken by one of the arbitrators. . . .
>
> "*Per curiam.* The evidence is inadmissible. The arbitrators were not called upon to take down the testimony of the witness, and probably took down

> only what was necessary for illustration. *They did not constitute a court; their authority was created by consent, and this consent never authorized them even to administer an oath to a witness.* This is the first time, we believe, that this kind of testimony was ever offered, and we are not disposed to establish a precedent. Evidence rejected."

In the 16th edition of Greenleaf on Evidence, section 163*a* and note 7 thereto, it is somewhat broadly stated that the testimony of witnesses given before arbitrators is admissible in a subsequent proceeding like that given in court. This is not a part of Professor Greenleaf's text, but is the text of the editor of the 16th edition, Professor John Henry Wigmore, as will be seen by reference to his preface (pp. vii–viii), in which he says:

> "The material added by the present editor is invariably represented by full faced [ ]."

The section referred to (163*a*) and the note (7) are so inclosed, indicating them to be Professor Wigmore's views. An examination of the cases referred to, however, will show that Professor Wigmore does not mean to state the law without qualification, and these authorities confirm the position taken by counsel for complainant, that in order to be admissible the evidence must have been under oath, and the witnesses be either dead or beyond the jurisdiction of the court.

The first case cited is Orr *vs.* Hadley, 36 N. H. 575. In that case, which was ejectment, it appears from the report that (p. 576)—

> "The plaintiff offered to prove the testimony of one John Gilchrist, *now deceased*, before a *board of referees, on trial of an action* in which the defendant, Peter E. Hadley, was plaintiff, and Joseph and J. G. Dodge were defendants—that action being trespass for cutting on part of the same land now in dispute."

In the notes of argument of counsel the ground of admission is thus stated (p. 577):

> "The testimony of Gilchrist, *at the former trial*, should have been admitted—1. Because he had testified *at a former trial*, in which the same question was involved, and *in a suit* where one of these defendants was a party."

The court held the testimony *inadmissible*, on the ground that (p. 580)—

> "The parties in the present suit are not the same as in the former; nor are they in privity with them so as to be bound by what was said or done in that action."

All the rest of the opinion is mere *obiter;* and all the court says about proceedings before arbitrators is that the rule of admitting the testimony of a deceased witness in a former suit "has been applied to a witness testifying" "before arbitrators." Citing—

> Forney *vs.* Hallagher, 11 Serg. & Rawle, 203.

Thus it appears that in the case of Orr *vs.* Hadley the witness had testified before referees and not arbitrators, in a judicial proceeding, an action of trespass, in which the cause had been referred to referees. As the court excluded the testimony on the ground that the parties were not the same, as the witness had testified, not before arbitrators in a common law submission, but in a judicial proceeding in an actual pending suit before referees in that action, no question as to the admissibility of evidence taken before arbitrators was raised in the case, and the illustration of the court in its *dictum* had no relevancy to the matter before it for decision and could not possibly be treated as authority.

It will also be found that the case cited, Forney *vs.* Hallagher, 11 S. & R. 203, does not support the *obiter* in Orr *vs.* Hadley.

The case is very short and is thus stated in the report:

> "The only question presented by the record was, whether the deposition of John Riley, offered in evidence by the plaintiff below, and rejected by the court, was evidence. This deposition was taken by consent, when the cause was depending before arbitrators, from whose award the defendant appealed to the court of common pleas. *The witness was living*, and supposed to be somewhere in York County, when his deposition was offered in evidence."

In ruling on this question the court, Tilghman, C. J., says (p. 203):

> "When a cause is brought into the common pleas *by an appeal from the award of arbitrators*, the proceedings are *de novo*. This deposition, therefore, is to be considered, *as if taken in another suit between the same parties for the same cause of action*. This is putting it in as strong a point of light for the plaintiff as it will bear, for the consent of the plaintiff was only that the deposition should be taken in the cause then pending, viz., before the arbitrators, and in such case, the general rule is, that the deposition would be evidence, *if the witness were dead*. Miles *vs.* O'Hara, 4 Binn, 111; Richardson *vs.* Stewartson's Lessee, 2 Serg. & Rawle, 84; Lightner *vs.* Wike, 4 Serg. & Rawle, 205. In the case of Magill *vs.* Kauffman, 4 Serg. & Rawle, 319, this court went one step further, and decided that the deposition was evidence, *though the witness were living, provided he were not within the State. But there was no ground for admitting the deposition in the case before us, because the witness was living within the State and within the jurisdiction of the court.* I am, therefore, of opinion that it was properly rejected, and that the judgment should be affirmed."

So, the evidence in that case was given in a judicial proceeding before arbitrators, under a statute from which an appeal lay to the court of common pleas. But the evidence was not admitted because the witness was not dead

or without the jurisdiction, but appeared to have been somewhere in York County.

In the case of White *vs.* Bisbing, 1 Yates, 400, also in Pennsylvania, was a decision at *nisi prius* in May, 1794. The action was ejectment, the report saying: "This was a mere *dispute about boundaries.*" The controversy had been submitted to arbitrators five years before, and they had entered into arbitration bonds. It does not appear what the form of the arbitration proceeding was, but it was presumably under the statute, as they had a statute in Pennsylvania on the subject at the time. It does appear from the report, however, that the witnesses had *testified under oath* before the arbitrators in the presence of the parties and *was then dead.* The court admitted the evidence, saying: "It is certainly much stronger evidence than hearsay, *which has frequently been received to establish boundary.*" Indeed it is clear in this case that had the statement of the witness instead of being delivered under oath in the presence of the parties before arbitrators, been a mere extra-judicial declaration and clearly hearsay, it would have been admissible in that case under the plain exception of the law which admits the declarations of deceased persons as to ancient boundaries.

In Bailey *vs.* Wood, 17 N. H. 365, the evidence given by a witness before arbitrators was offered and held admissible. It does not clearly appear from the report what was the nature of the arbitration, whether under a statute, or under a rule of court, or under a common law submission, but the inference from the language of the court is that it was in a judicial proceeding. *But it does appear that the witness was dead at the time his alleged testimony was offered*, and the court in its opinion assumes that the *witness was under oath.*

The only other case referred to by Professor Wigmore in his note to Greenleaf is the case of McAdams *vs.* Stilwell, 13 Penn. St. 90. In that case the evidence of a *deceased witness* given before *referees* was held admissible. These referees, however, were appointed in a *reference of a pending case in*

court referred to them under a statute where they acted for the court, and the *witness had been sworn* and testified before them. Indeed all the cases in Pennsylvania on the subject are of this character.

But there is a plain difference between the case of arbitrators created by consent under a common law submission, and referees appointed under a statute or by rule of court, to whom a pending judicial proceeding is referred to take the testimony and render a decision therein between the parties. This distinction is marked by Mr. Morse in his work on arbitration, where he expressly points the difference between a *referee* and a common law *arbitrator*, saying (p. 131):

> "But a *referee* properly so called *may obtain power to administer a judicial oath* or compel production of books, etc., either from statutory provisions or from the order of the court appointing him."

It is also to be observed that in all but one of the cases cited the witness whose testimony before the referees was offered was dead, and in that case his evidence was *excluded because he was not dead*, and was accessible.

The witnesses whose so-called testimony were used in this case were not dead, nor beyond the jurisdiction of the court, so far as anything in this record shows, and indeed one of them, Mr. Schramme, whose alleged testimony is most used in behalf of the defendants, appears by the record not only to have been alive, accessible and within the jurisdiction of the court, but actually in attendance at all the sessions in which testimony was taken in this case (Rec. pp. 1117, 1230, 1265).

Such Evidence, if Admissible, Can Not be Considered Because Never Offered in this Proceeding.

But even if, under any conditions, this so-called testimony could be admitted, it can not be considered in this case for

the conclusive reason that it was never at any time offered except for the restricted purpose hereinbefore stated.

Certainly no evidence, though in every respect competent and admissible, can get into a case *proprio vigore*.

It must be offered, and when offered the right to object to it, and, if received, to reply to it, instantly arises.

The only evidence offered by the defendants was the testimony of Professor Haupt, and at no stage of the case did they offer in evidence the so-called testimony taken before the arbitrators or any part of it, nor did they object to the qualified offer made by the complainant (Rec. p. 1168) when the record of the arbitrators giving their proceedings was offered "*for the sole purpose of showing that those matters and things therein set forth took place.*" On the contrary, the defendants not only did not object to it but expressly assented to it, as shown *supra* (Rec. p. 1168).

Had the so-called testimony been given under oath, in another judicial proceeding, in the court below, between the same parties, it certainly could not have been read at the hearing without having been offered in evidence during the taking of the testimony. Had it been offered the complainant would have objected to it and moved the court to suppress it, and failing in that would have then had the undeniable right to reply to it. Indeed, assuming that the defendants might seek to prove in this case some of the facts attempted to be set up in the so-called testimony before the arbitrators, the complainant was prepared to meet it by oral and documentary evidence, and had proved by the testimony in this case a large number of documents for the express purpose of offering them in evidence in rebuttal, as the court will see by referring to the testimony showing the large number of documents proved but not offered in evidence.

By reference to the testimony taken in behalf of the complainant it will be seen (Rec. p. 1121) that a batch of documents brought from Colombia and proved by Mr. Peña, were marked for identification by the notary consecutively from

1 A. P. to as high as 115 A. P. (Rec. p. 1125). Only twenty-eight of these one hundred and fifteen documents were offered in evidence by the complainant, the remaining eighty-seven documents having been proved for use in rebuttal in the very event that the defendants should attempt to establish by proper evidence any of the facts stated by their witnesses before the arbitrators.

By the failure of the defendants, during the taking of the testimony, to offer evidence on the points covered by this so-called testimony before the arbitrators the complainant was precluded from offering in rebuttal the oral evidence it could have produced and the documentary evidence which it had proved for that very purpose.

The defendants not only failed to call any witness to prove any fact stated in the proceedings before the arbitrators, but failed to offer in evidence even the so-called testimony which was given before the arbitrators, and this so-called testimony as such has never been offered in this case. After the case was closed, had come on for final hearing, and the opening argument of counsel for complainant had been closed, for the first time since the institution of this suit, the defendants undertook, through the medium of their briefs and in oral argument, to inject the matters stated before the arbitrators as evidence in this cause. Such a proceeding, it is submitted, is unknown in judicial practice, and can not possibly be sustained.

To permit a party to read and use at the final hearing a mass of alleged testimony, not given under oath, not given in a judicial proceeding, and given by persons still living and within the jurisdiction of the court, and whose so-called testimony was never at any stage of the case offered in evidence, would be an enormity against the rights of the party.

It is important that the objection of the complainant to the use in this cause of the so-called testimony before the arbitrators should not be misunderstood by the court.

It is not claimed that the judgment or decision of the arbi-

trators upon conflicting statements of fact, made before them, in behalf of either party, is subject to re-examination or review by the court. On the contrary the contention of the complainant is, simply, that any issue of fact *in these judicial proceedings*, requiring evidence for its solution, or for which, or with respect to which, the introduction of evidence would be proper, required that evidence, legally competent in a judicial proceeding, should be regularly offered, through the testimony of witnesses regularly sworn in the cause, or through the production of documents regularly proved in this cause. The same fact may have been in issue before the arbitrators, still when it became an issue in a judicial proceeding neither their judgment nor the evidence before them would be admissible.

Thus it was necessary that the arbitrators and the court should be provided with a translation into English of the text of the agreement of arbitration. But it is insisted that such translation in *this* proceeding, in the absence of agreement of counsel, could only be supplied through a competent witness sworn in the cause, as was done by the complainant. It is also insisted that it was the duty of the court below to ascertain the proper English translation of this agreement independently of any steps taken to that end before the arbitrators; and that when so translated it was the duty of the court legally to construe and interpret that document, if its terms required any construction or interpretation, independently of, and without reference to any such proceedings before the arbitrators.

If, in the opinion of the court, this document, when translated, presented any uncertainty or ambiguity of meaning, it was the right of the parties to offer competent evidence in this cause for the resolution of such uncertainty or ambiguity, but this could not be supplied by recourse to the extra-judicial statements before the arbitrators.

The fact that anybody claimed before the arbitrators that the agreement was uncertain or ambiguous could not ren-

der it so for the purposes of this case if in point of fact it is clear and plain; and the fact that any person or persons made statements or representations before the arbitrators of facts supposed to bear upon or elucidate any such uncertainty or ambiguity, was wholly immaterial and could not take the place of competent testimony in the cause itself for the consideration of the court.

The fact that the arbitrators, or some of them, or some one or other of the parties, or some persons appearing before the arbitrators, might have supposed that there was uncertainty or ambiguity in the agreement does not constitute an ambiguity. As said by Mr. Greenleaf:

> "It is to be observed that words can not be said to be ambiguous because they are unintelligible to a man who can not read; nor is a written instrument ambiguous or uncertain merely because an ignorant or uninformed person may be unable to interpret it. It is ambiguous only when found to be of uncertain meaning by persons of competent skill and information. Neither is a judge at liberty to declare an instrument ambiguous because he is ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. . . . Hence it follows that no judge is at liberty to pronounce an instrument ambiguous or uncertain until he has brought to his aid in its interpretation all the lights afforded by the collateral facts and circumstances, which as we have shown may be proved by parol."
>
> 1 Greenleaf Ev. (15th ed.), sec. 298.

The fact, if it be a fact, that the agreement appeared to be ambiguous or uncertain in its terms to Mr. Haupt or Mr. Schramme or Mr. Peña could not in any respect control the court, and if the court, after the instrument was translated, conceived that there was any uncertainty or ambiguity in its terms, the rule is plain that the court was obliged to seek light for its understanding and interpretation, not in any

extra-judicial statements made before the arbitrators, but in a direct inquiry in these proceedings themselves through the ordinary medium of lawful and competent evidence.

If the aid of the surrounding circumstances existing at the time the instrument was executed was deemed material to the proper understanding of the instrument by the court it was necessary that those surrounding circumstances and facts should be regularly proved in the cause by competent legal evidence, and the court was not at liberty to resort to the unsworn declarations of persons before the arbitrators as to what those surrounding facts and circumstances were; *a fortiori* was the court precluded from a resort to such sources of enlightenment when these unsworn allegations had not even been offered in evidence for the purpose by any party to the cause.

Nevertheless, the learned judge based his conclusions, not upon the competent evidence before him in this case, but resorted to the so-called evidence given before the arbitrators. At the conclusion of his opinion the court says (Rec. p. 1302):

> "The court in reviewing the conduct and the award of the Commissioners *must consider all the evidence laid before them* by the parties to the convention, and it will regard as accurate the transcript of such proceedings, found in complainant's bill, and admitted by the defendants to be correct."

It is submitted, and with great respect for and deference to the learned judge who tried the cause in the circuit court, that as to the most important feature of the case, he abdicated his judicial authority and failed in his judicial duty to ascertain and decide for himself the true intent and meaning of the agreement under which the arbitrators acted.

Thus the court says:

> "The ambiguities in the submission were caused by the fact that certain words in it (in the Spanish

language) were each susceptible of more than one meaning" (Rec. p. 1297).

The Spanish text did not cause any embarrassment or uncertainty to the court. The court was in possession of a legally proved English translation in the cause made by an eminent expert, Mr. Arthur W. Fergusson, whose qualifications are fully set out in the record (Rec. pp. 1130–1134). He had had a special experience with reference to railroad contracts and transactions among Spanish-speaking people, he was the official interpreter at the Paris Convention for the Treaty of Peace between Spain and the United States, and he is now the official interpreter for the Governing Commission of the Philippine Islands. No witness was called to impeach the accuracy of his translation, and his testimony stands uncontradicted and uncriticised by anything in this record. He asserts no ambiguity in the instrument and gives no more than one meaning to any word in it.

This statement, in the opinion of the court below, is founded, therefore, wholly upon contentions made before the arbitrators upon extra judicial statements taking place before them which were never offered in evidence in this cause. This is not only undeniable from the state of the record, but it is made plain and manifest by the ensuing words of the opinion, where the court says:

> "Both parties to the agreement offered expert testimony as to the true meaning of said words; argument of counsel was heard and the commission rendered a decision to the effect that the items included by it in the award were embraced in the terms of the submission. This question was one for the commission to decide, and as the words in controversy were in a foreign tongue and had a technical meaning the evidence of experts was properly taken" (Rec. pp. 1297–1298).

It is respectfully submitted that this error of the learned

judge is the foundation of all the other erroneous rulings in the cause.

That the court was not bound by a decision of the arbitrators on a question relating to the scope of the agreement is abundantly shown by the authorities herein on that subject. The gravamen of this bill is that the arbitrators made a mistake in that essential feature of their proceedings, and that in the scope which they gave to the agreement they committed error, and the whole purpose of this proceeding is to correct that error.

For the court to adopt their conclusion as binding upon itself is in effect, while entertaining the cause, to deny to itself the exercise of the very jurisdiction which was the sole purpose of the proceeding and upon which the court was bound to act. None of the "expert testimony" or "argument of counsel" before the arbitrators was before the court, none of it had been offered in evidence, and the court had no right to refer to it. No one in this cause testified that any words had a "technical meaning," and when presented to the court for judicial examination the agreement was not in a foreign tongue, but in a proved translation.

A careful examination of the opinion of the court and comparison with the record will show a number of errors into which the court fell by reason of treating the extra-judicial statements made before the arbitrators as competent evidence of the facts there declared.

The court says:

> "On *November 29th, 1890*, Cherry *assigned his interest* in the contract to the *two defendants*, the Cacua Company, which was organized to operate the road, *and the Colombian Construction and Improvement Company*, organized to construct it. The complainant was notified of the assignment and thereafter recognized the Cauca Company" (Rec. pp. 1285–1286).

In support of this statement in the opinion of the court not one syllable of testimony can be found in the evidence

adduced by the parties. The counsel for the defendants carefully refrained from putting upon the witness stand any person who had any knowledge whatever of the relations of the Cauca Company, and the Colombian Construction and Improvement Company, and they also carefully refrained from putting in evidence one single document explaining or bearing upon that relation. All sorts of assertions and pretensions, inconsistent and readily demonstrable as false, were made before the arbitrators, but these were never offered in evidence in this cause, and, as before shown, would have been utterly incompetent and inadmissible if so offered.

The only evidence of an assignment of Cherry's contract given in the case was offered by the complainant (Rec. pp. 1212–1213).

It must be remembered that by the terms of article 34 of the concession (Rec. p. 34), the right to assign the concession to any individual, company or corporation of a private character was given upon the express proviso "of giving notice thereof to the Government of the Republic" (Rec. p. 34).

The first and only notice given to the government, so far as any evidence in this record is concerned, is the letter from Victor Mallarino to the Minister of Public Works of August 3, 1891, notifying the government that Cherry had assigned his contract not "to the *two defendants*," as stated by the court, but to a company called the Cauca Company, that the deed was executed not "on November 29th, 1890, as stated by the court, but on the 6th of April, 1891, before Jose G. Morales, a notary public of New York (Rec. p. 1213).

This alleged contract of assignment to the Cauca Company was never produced in evidence, nor was any copy thereof produced, and the only knowledge of its terms is conveyed by the letter aforesaid, from which it would seem that it was an absolute and unconditional assignment of all Cherry's rights to that company, and from which it also appears that the government was required to return it to the parties from whom it was received (Rec. p. 1213).

The court not only falls into the error of stating that Cherry, on the 29th of November, 1890, assigned his interest to the *two* defendants, when the only evidence is that he did not assign it until the 6th of April of the following year, and then only to the *one* defendant, but the court also adds: "The complainant was notified of the assignment" (Rec. p. 1286), when the only assignment of which the complainant was notified was the one of April 6, 1891, to the one company, the Cauca Company, to which assignment the court makes no reference whatever.

In stating the terms of article 5 of the submission to arbitration the court says that the arbitrators were "to examine the books and accounts of the company at New York," without specifying which company. On reference to the proved translation of the submission it will be found that said article particularly provides that the commission shall "examine and consider the books and accounts of the CAUCA COMPANY in New York" (Rec. pp. 1208), thus particularly and exactly specifying and limiting whose books of account were to be examined.

The learned judge in his opinion says:

> "The books of the *Cauca Company* were offered, explained, referred to experts for examination and report and subsequently considered by the commission" (Rec. p. 1289).

In this statement the learned judge is again in error as to the fact.

The Commission did not examine and consider the books and accounts of the *Cauca Company* at New York, but on the contrary and against the objection of the complainant's representative, examined instead alleged copies of books and accounts of the *Colombian Construction and Improvement Company*, a company with which the complainant had no relations, whose transactions it had not agreed to consider, and for whose expenditures it had not authorized the arbitrators to allow one dollar.

The proceedings before the arbitrators, which are evidence of what took place before them, show that the agents and representatives of the Cauca Company, before the Commission, including Mr. Schramme, the arbitrator in behalf of the Cauca Company, claimed that the Cauca Company *never had any books* (Rec. p. 152).

The fraud that was perpetrated upon the complainant through the medium of these alleged books and accounts is plain and demonstrable from the competent evidence offered in this cause, of which the court did not take notice.

By the notice of assignment given to the complainant on August 3, 1891, it was led to believe that the Cauca Company was the sole assignee of the contract with Cherry.

By the twenty-first article of the concession to Cherry the complainant was given the right to examine the books of accounts of the railway, and the concessionary was bound to facilitate such examination.

As early as February, 1892, the superintendent of the defendant, the Cauca Company, informed the commissioners of the Government, when they sought to examine the books, that the accounting office was in New York, and that there were only largely incomplete data in Colombia (Rec. p. 1254), and from this time until as late as September 30, 1895, the agents of the Cauca Company were representing to the complainant that its books of account were in New York (Rec. p. 1225).

In this series of communications no mention is made of the Colombian Construction and Improvement Company and no books of any company are anywhere referred to but those of the Cauca Company.

When objection was made before the Commission to receiving and considering the alleged accounts that were there accepted and which were not the accounts, and did not purport to be the accounts, described in the submission to arbitration, it was represented by the person called as a "witness" for the Cauca Company, one Blum, that the original books of

account from 1890 to 1893 and the original sheets of account from that time on had deen destroyed by fire in Buenaventura in January, 1896 (Rec. p. 117), while the legal evidence in this cause, the written communications of the agent of the Cauca Company in Colombia from February, 1892, to the 30th of September, 1895, represented that the original books of account and data were not kept at Buenaventura but were in New York in the possession of Mr. C. F. Schramme (Rec. p. 1224), one of these arbitrators, who though he attended all the sessions of taking testimony in this cause, was not produced as a witness.

It further appears that in the proceedings before the arbitrators when the Cauca Company's representatives were, against the objection of Colombia, attempting to have used as evidence for the establishment of its claim these unauthorized accounts of the Colombian Construction and Improvement Company, that Schramme, the arbitrator, then stated that the Cauca Company never had any books (Rec. p. 152).

From the foregoing statements it is plain to see how entirely mistaken was the learned judge when he stated in his opinion that the—

> "books of *the Cauca Company* were offered, explained, referred to experts for examination and report and subsequently considered by the Commission."

The court further says in its opinion:

> "The original concession contemplated its assignment to a foreign company or individual and *the assignment by Cherry was of record in the proper office in Bogota*, the consideration of which assignment is one of the items of the award complained of" (Rec. p. 1298).

And again, on the same subject, the court says:

> "The amount of $135,000 was included in the award as the cost of the concession. That Cherry

> necessarily made *large expenditures in the negotiations preceding the execution of the original concession is apparent* and it is not strange that he provided *in his assignment* that he should not only be reimbursed the same but also that he should be compensated for the valuable franchise he had secured" (Rec. 1300).

The assignment by Cherry of his concession to the Cauca Company "of record in the proper office in Bogotá" was never offered in evidence in this cause or before the arbitrators and is not to be found in *this record*. Its terms have never been disclosed either in this cause or before the arbitrators, and it is apparent that the learned judge was led astray as to the facts of the case by the persistent misrepresentations that are to be found in the extra-judicial statements made before the arbitrators.

Furthermore, the court will search this record in vain for any evidence of "large expenditures in the negotiations preceding the execution of the original concession."

No witness so testified and no document was proved or offered in evidence bearing on that subject. As the concession was a *contract*, made directly with Cherry by the Executive and the Congress of Colombia, it is difficult to see that any expenditures could have been made by Cherry to secure it unless they were sums paid to debauch the officials of the government, a matter so far not proved or charged in the case.

The only document in evidence here which mentions the sum of $135,000 is an agreement between the Colombian Construction and Improvement Company, signed by its president and by Arbitrator Schramme as secretary and treasurer, and by D. Callman as attorney for Cherry, purporting to have been executed on the 29th of November, 1890 (Rec. pp. 44–7), four months and seven days *before the assignment of April 6, 1891, of the Cherry concession to the Cauca Company*, the only contract of assignment of which

the complainant had notice, and the only one ever in Bogotá (Rec. pp. 1212–13).

The learned judge further states:

> "The company had absolutely declined a settlement the basis of which was to be an expert valuation of the actual cost of the physical construction of the railway" (Rec. p. 1298).

No witness in this cause has testified to any such fact. This statement has for its basis solely the extra-judicial, unsworn statement of one of the arbitrators, Mr. Schramme, in the course of their proceedings (Rec. pp. 623–624), which statement by the unanimous ruling of the arbitrators was decided to be excluded from consideration and not to be treated as evidence even by them (Rec. pp. 637, 1273). Had this statement been offered by Schramme, under oath, in this cause, it would have been inadmissible under the settled rules of evidence established by this court.

The learned judge continues:

> "The President of the Republic of Colombia had offered to see that $400,000 was paid as a cash settlement of the controversy" (Rec. p. 1298).

And the learned judge also inquires:

> "Would the President of the Republic of Colombia have suggested in settlement of the controversy a sum in amount nearly double that of the actual expenditures for physical construction, about which there seems to have been but slight divergency of opinion, if that matter had been the only one in controversy" (Rec. pp. 1298–1299).

No witness in this cause has stated any such fact, nor has stated any fact as to any discussion between the President of the Republic of Colombia and any person or persons connected with this transaction.

These observations of the learned judge are also founded exclusively upon the extra-judicial statements of Schramme,

one of the arbitrators before the arbitration, which statements were contradicted in another extra-judicial statement by cable from the President of the Republic, who was alleged to have made them, and after such contradiction the arbitrators decided to exclude from evidence and consideration the statements of both Schramme and of the President of the Republic (Rec. pp. 637, 1273).

It is to be observed, also, that these alleged statements of the President of the Republic, detailed by Schramme and denied by the President, are claimed to have been made prior to the agreement for arbitration.

That agreement, signed by Mr. Caro and by Cherry, does not state, however, that the government offered to pay $400,000, but on the contrary, in express terms, states that the government calculates "approximately that the Cauca Company has disbursed in the work on the Cauca Railway the sum of about $200,000."

The only evidence in this record, therefore, of any representations of Mr. Caro of his estimate (if it were the legitimate subject of inquiry), is one-half the amount named in the judge's opinion, and that this was estimated by the Government to be all is plainly seen from the further statement in the same paragraph which says:

> "In case such indemnity as may be fixed in conformity with this agreement shall be greater than $200,000, the Government is to pay the excess."

It will be seen by this illustration that the learned judge not only had recourse to these discredited and rejected extra-judicial statements of Schramme, one of the arbitrators before the arbitration, in leading to the judgment which he reached, but that he allowed these unsworn statements of an alleged antecedent negotiation to overthrow the written evidence signed by the president and by Cherry, the general manager and attorney in fact of the Cauca Company, to the effect that the government's concession of liability did not extend beyond the sum of $200,000.

III.

Errors in Holding Certain Specific Items of the Award to be Within the Agreement for Submission.

The Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Errors Assigned.

The award in this case is composed of a number of items, all but one of which are claimed by appellant to be without the terms of the submission, because no one of them comes within the descriptive terms of the agreement; that is, no one of them is a sum which the Cauca Company expended "on the labors and works executed by it in the construction of said railway."

The items of the award are as follows:

1.	Total cost of construction, work and materials of every kind and description, and of rolling stock, tools, etc	$233,909 14
2.	Interest on above amount of cost of construction	48,668 18
3.	Salaries of executive officers of the Colombian Construction and Improvement Company, *not a party to the submission*..	108,181 42
4.	Traveling expenses of the executive officers of the said Colombian Construction and Improvement Company.....	29,386 30
5.	Part of the sum of $50,000 alleged to have been allowed to Cherry and Schramme by the said Colombian Construction and Improvement Company, February 15, 1897, forty-two days after signing of the submission, for services in securing the agreement for submission.....	29,200 00
6.	Office expenses, sundries and incidentals of the New York office of the said Colombian Construction and Improvement Company.....	21,727 58

7. Interest on bonds	32,333 40
8. Amount alleged to have been paid to Cherry for the concession by the Columbian Construction and Improvement Company	135,000 00
9. Interest on this amount	13,643 33
10. Counsel fees to Marcus Stine, counsel for Cauca Company before the arbitrators	10,000 00

The first item of $233,909.14 was fixed by stipulation and as to that there is, as before stated, no dispute.

The second, seventh, and ninth items being interest on the cost of constructing the road, interest on bonds and interest on the alleged payment for the concession, were excluded by the circuit court as being allowances not within the submission and therefore invalid (Rec. pp. 1300–1).

The tenth item, being the allowance to Marcus Stine of $10,000 as counsel fees for his services for the company before the arbitrators, was also disallowed by the circuit court (Rec. pp. 1301–2). The decree of the circuit court having been affirmed on appeal to the court below, and the defendants having prosecuted no appeal to this court, the invalidity of those items is finally adjudicated and, therefore, they require no further notice.

Of the remaining items, it is to be observed that no one of them in any way relates to the work, labor, or materials employed in the construction of the railway, nor to the purchase of rolling stock, tools, etc., but that each and every one of them concerns an alleged corporate liability of the Colombian Construction and Improvement Company, a stranger to the submission, and of and for whose expenditures no inquiry and no allowance was authorized. All of these items, in addition to certain special objections which will be noticed hereafter, are subject to the one general objection, that they are alleged expenditures by or liabilities of the Colombian Construction and Improvement Company, not a party to the agreement for submission—not a party

to or interested in the concession out of which the controversy arose, for the settlement of which this submission was made.

It is important, therefore, to consider the relation of this stranger corporation to the award and the position which it occupies in the record.

The award, though made to the Cauca Company, the party to the submission, contains in addition to the amount stipulated for the labor and materials employed in construction of the road and for its rolling stock, tools, etc., allowances for two of the corporate officers of this stranger corporation, one of whom is the arbitrator, Mr. Schramme, in the sum of $108,181.42 for salaries, $29,386.30 for alleged traveling expenses of the same two persons, and a gratuity of $29,200, alleged to have been awarded them by this stranger company by resolution of its board of directors *forty-two days after* the submission was signed; in all, $166,767.72, of one-half of which sum, or $83,383.86, Mr. Arbitrator Schramme is the personal beneficiary, while Mr. Cherry, his associate, receives the additional sum of $135,000. In addition to this, for the alleged expenses of the *New York office* of this stranger company the sum of $21,727.58 is also allowed, making an aggregate of $323,495.30 on account of the alleged claims against this stranger company, and nearly $90,000 more than the entire amount awarded as the cost of the work, labor, materials, rolling stock, and tools of the railroad, the only matter within the submission.

Such is its relation to the award.

Now as to the position which it occupies in this record.

The original contract with Cherry, known as the concession, became operative through the enactment of the Congress of Colombia of the 16th of October, 1890 (Rec. pp. 26–37).

On the 29th of November, 1890, the Cauca Company, the party to the submission, was incorporated under the

laws of the State of West Virginia (Rec. pp. 37–40), by a certificate of that date, for the expressed purpose of constructing the railroad described in the concession.

On the same day the Colombian Construction and Improvement Company, not a party to the submission, was incorporated under the laws of West Virginia (Rec. pp. 40–44), by a certificate of that date, for the purpose (Rec. p. 40):

> "Of establishing, conducting, and maintaining in the Republic of Colombia and in other parts of South and Central America an *institution* for the following purposes:"

And then follows the specification of almost every known business, including banking, safe deposit, and trust business; construction of railroads, telephone and telegraph lines; piping and tubing for transportation of oil; mining, holding, owning, and selling concessions from any of the South and Central American States; acting as fiscal agent or attorney in fact for cities, municipalities, and other bodies politic; manufacturing, breeding and dealing in live stock; life, fire, marine, and other insurance; mercantile agencies; hotel, gas, electric light, waterworks, building and loan associations, and other businesses too numerous to detail.

It is as officers of this company that the enormous salaries and traveling expenses and gratuity are allowed, and it is for its alleged obligations that the other items making up the vast total of $323,495.30 are allowed.

The thirty-fourth article of the concession provides that (Rec. p. 34):

> "This present concession shall not be assigned to any government or foreign nation, but may be transferred to any individual, company or corporation of a private character upon giving notice thereof to the Government of the Republic."

On the 3d of August, 1891, Mr. Cherry notified the gov-

ernment that he had assigned the concession to the *Cauca Company* by a deed executed on the *6th of April of that year* (Rec. pp. 1212–1213).

On the 18th of August,1891 (Rec. p. 1213), Mr. Mallarino, his agent, sent to the government a certified copy of this assignment to the *Cauca Company*, and on the 16th of August, 1895, he reaffirmed the fact of that assignment to the *Cauca Company* and offered if necessary to send another copy (Rec. p. 1222).

On the 23d of October, 1895, the *Cauca Company* gave to Cherry a power of attorney reciting that the *Cauca Company was then the owner of the concession*, in which Cherry was, among other things, authorized to sell, assign, or cancel the concession (Rec. pp. 1226–1229).

The agreement for submission which was executed on the 4th of January, 1897, by "J. L. Cherry, attorney in fact, General Manager of the Cauca Company" (Rec. p. 1210), recites on its face that Cherry executes the agreement for submission on behalf of the *Cauca Company* by virtue of the before-mentioned power of attorney from the *Cauca Company* of the 23d of October, 1895.

Thus it is shown by uncontradicted proof that, from the 3d day of August, 1891, and up to the actual execution of the agreement for submission, it was constantly represented to the Colombian Government that the *Cauca Company* was the assignee of the concession, and the agreement for submission is confined to that company.

The 24th paragraph of the bill (Rec. 11–12) recites the intervention of the Colombian Construction and Improvement Company in the arbitration proceedings, and calls upon it "to discover in this cause what if any interests or rights it pretends to have in the premises."

The defendants' answer to that paragraph (Rec. 891–892) makes no discovery, but charges that the complainant's demand for discovery is not made in good faith.

The circuit court, in its opinion on this subject, says (Rec. p. 1302):

> "I do not deem it essential to discuss the questions raised *as to the relations existing between the Cauca Company and the Colombian Construction and Improvement Company*, further than to say that it is plainly shown that *they were such as usually exist between railroads and their construction companies*, and also that the conclusion is inevitable from the proceedings before the commissioners *that the complainant was fully advised of such relations before the convention was signed*, and evidently intended that *all legitimate expenditures of the said Improvement Company should be considered by the Commission* in ascertaining the indemnity it was to find for the Cauca Company.

In this statement the learned judge fell into a very grave error.

In the joint answer of the Cauca Company and the Colombian Construction and Improvement Company, answering the eighth paragraph of the bill, it is said (Rec. p. 875):

> "That the incorporation of these defendants was a proper method of acquiring the amount of capital necessary to make the very extensive public works, to wit: The railroads in the said concession (Exhibit No. 4) described; and that the stockholders and directors of the said defendants were numerous, responsible, and wealthy persons; and that these defendants were incorporated in good faith for the purpose of carrying out the provisions of the said contract or concession, all of which facts were well known unto the complainant and its public officials, and *these defendants* were recognized and accepted *as assignees* of the said James L. Cherry, and acknowledged and received in his room, place and stead as his *legal successors*, and obligated to perform the terms of the said contract or concession and entitled unto the benefits thereof."

The allegation here is plainly made that the concession

was assigned to *both* defendants; "these *defendants were* recognized and accepted as *assignees* of said James L. Cherry."

The said defendants in the second paragraph of their joint cross-bill make the following averments (Rec. 1081–1082):

> "That on or about the 27th day of August, 1890, a certain James L. Cherry entered into a certain contract with the said Republic of Colombia, through its authorized public officials, a copy of which contract is filed with the bill of complaint of the said Republic of Colombia in said cause as 'Exhibit No. 4.' . . . That for the purpose of carrying out the true intent and purpose of said contract, the complainant, the Cauca Company, was incorporated under the laws of the State of West Virginia on or about the 29th day of November, 1890; and your orator, the said Colombian Construction and Improvement Company, was duly incorporated by said State of West Virginia on or about the 29th day of November, 1890, as will more fully appear by duly certified copies of said articles of incorporation filed by the said Republic of Colombia with its bill of complaint, the same being 'Exhibits Nos. 5 and 6,' respectively. That the Cauca Company *and* the said Colombian Construction and Improvement Company *received an assignment of the said contract or concession from the said James L. Cherry* on or about the 29th day of November, 1890, copies of which said contracts are filed with the said original bill of complaint of the said Republic of Colombia as 'Exhibits Nos. 7 and 8' (Rec. pp. 44–49), respectively."

Here again is renewed the allegation of the assignment of the concession to *both* defendants, together with the specification of the instruments by which the alleged assignment to *both* defendants was claimed to have been effected.

The complainant, in its answer to this paragraph of the cross-bill, says (Rec. p. 1099):

> "This defendant *denies* that the Cauca Company *and* the Colombian Construction and Improvement

> Company *received an assignment of the contract of August 27, 1890*, between this defendant and the said Cherry, and this defendant avers that the said pretended contracts, copies of which are filed with the original bill, marked 'Exhibits Nos. 7 and 8,' are mere shams and part and parcel of a scheme on the part of said Cherry and others to cheat and defraud this defendant, to escape the obligations of his contract of August 27, 1890, and to speculate with stocks and bonds of the said corporations."

The court will see from these averments in the pleadings that one of the issues made *in this cause* was as to the relations of the Colombian Construction and Improvement Company to the concession.

The fact that it was a stranger to the submission made any allowance on its account *prima facie* void, and the issue thus made in these pleadings was therefore a most important one.

Notwithstanding the issue thus made, not one syllable of proof was offered in this cause as to the relations between the Cauca Company and the Colombian Construction and Improvement Company, and notwithstanding the positive statement of the learned judge (Rec. p. 1302) "that the complainant was fully advised of such relations before the convention was signed," no evidence was offered which supported that statement, and the fact is that the only mention of the Colombian Construction and Improvement Company ever made to the complainant, to be found in this entire record, is a single sentence in a recital in the power of attorney of the 23d of October, 1895, which is in the following words (Rec. p. 1227):

> "Whereas the Government of the Republic of Colombia, South America, by a written contract which, under the name of contract number twenty, executed the seventeenth day of August, one thousand eight hundred and ninety, and approved by the Legislature of Colombia, granted to James L. Cherry the

> right to construct and operate the Cauca Railroad under the conditions therein expressed, *which contract was later assigned* by said James L. Cherry *to the Cauca Company, and is to-day the property of the said company, subject*, nevertheless, to the terms of *a* contract concluded with the Cauca Company, and which is at present the property of 'the Colombian Construction and Improvement Company,' *a copy of which is to be found in the archives of the company.*"

This power of attorney is from the *Cauca Company alone* (Rec. pp. 1226–9), by virtue of which Cherry, in behalf of the Cauca Company, *alone*, entered into the agreement for submission under which these arbitrators acted, and by which the award in controversy was made.

And finally it is the fact that there is not to be found within the pages of this record any contract between the Republic of Colombia and the Colombian Construction and Improvement Company, nor any contract or obligation of any sort or description to which that company is a party, except a contract with *Cherry alone*, having no relation to the concession (Rec. pp. 47–9).

Nor is there to be found, within the pages of this record, any contract of any sort or description between the Cauca Company and the Colombian Construction and Improvement Company, either in the proceedings in this cause or in the proceedings before the arbitrators. So far as this record is concerned, the Colombian Construction and Improvement Company never had any right, title, or interest in the railroad, the concession, or the submission to arbitration, and never at any time had any dealings with the Government of Colombia.

Furthermore, there is not to be found within the pages of this record, either in the evidence before the court or in the proceedings before the arbitrators, a syllable to indicate any liability on the part of the Cauca Company for any expenditures or obligations of the Colombian Construction and Improvement Company, nor any obligation on the part

of the latter company for any expenditures or obligations of the former.

Bearing in mind that from August, 1891, continuously to the signing of the agreement for submission all representations made to the complainant were to the effect that the Cauca Company was the owner of the concession and the agreement of submission was executed with that company alone, by its agent, acting under the power of attorney executed by it, which recited that it was *still* the owner of the concession, and bearing in mind that no claim or interest of the Colombian Construction and Improvement Company was ever made known to the complainant, and that its relations, if any it had to the Cauca Company, were never disclosed and can not now be ascertained from this record, it is a legal impossibility to bring any of the transactions of the Colombian Construction and Improvement Company within the terms of this submission.

Although the burden was upon these two defendants to show the relations, if any, they had to each other or to the concession which could properly bring the Colombian Construction and Improvement Company within the terms of a submission with which it was not connected by name, not a witness was called nor a document offered bearing on the subject.

Such, then, is the position of the Colombian Construction and Improvement Company on this record. It is not named in the agreement for submission, never had any contractual relations with the government, and though the pleadings put upon it and its co-defendant the burden of showing by what means its alleged expenditures could be legally included in this award, both defendants have failed to offer any evidence in any way connecting it with the submission.

In addition to this general objection to all the items of the award, each of the disputed items is open to certain other objections, which will be more specifically noticed.

The fifth item of $29,200, the alleged allowance to Cherry and Schramme for services in securing the agreement for submission.

By the vote of Messrs. Haupt and Schramme against the protest of Peña there was added to the items submitted in Mr. Haupt's preliminary report the sum of $29,200 (Rec. pp. 721–725).

The allowance for this item is so glaringly indefensible that it is difficult to believe that its inclusion by the arbitrators was not the result of some corrupt influence.

It is a part of a claim for $50,000 alleged to have been made against the Colombian Construction and Improvement Company by Cherry and Schramme for their services in going to Bogotá and effecting the agreement for the submission to arbitration.

It had no existence at the time the submission to arbitration was executed, and *did not arise until forty-two days thereafter*, by a resolution passed at a special meeting on the 15th of February, 1897 (Rec. pp. 658–9). It was not made against the *Cauca Company*, nor allowed or paid by that company; it had nothing whatever to do with the construction of the railroad, but was confessedly concerned wholly with effecting a mode of settlement of this controversy.

The nature of the claim as asserted before the arbitrators is set out in their proceedings through the catechising of Mr. Schramme, one of the arbitrators, when acting in the rôle of witness, and is as follows (Rec. p. 240):

> "Mr. STINE: Q. What was your official position? A. Secretary and treasurer.
>
> "Q. Of what company? A. *The Colombian Construction & Improvement Co.*
>
> "Q. And what was Mr. Cherry's official position? A. The manager of the Cauca Railroad Company and *president of the Colombian Construction & Improvement Company.*
>
> "Q. And you were paid a salary as secretary and treasurer of the company? A. That is right.

"Q. Mr. Cherry, you stated, was *manager of the Colombian Construction & Improvement Co.?* A. *Yes.*

"Q. When you went down to Colombia and were *engaged on these negotiations* with the Colombian Government, *were your duties in relation to those negotiations the regular routine duties as secretary and treasurer of the Cauca Company and manager of the Colombian Construction & Improvement Company, respectively, or were they outside?* A. *They were outside.*

"Q. Did you go down there on behalf of these two companies as the representatives of them *to carry out particular negotiations?* A. We did.

"Q. Did you hand in a bill to the company for such services for these two trips as representatives of the company? A. I did.

"Objected to by Mr. Robertson; overruled; exception.

"Q. What was the amount of that bill? A. $50,000; that is, $25,000 apiece, gold."

Mr. Haupt in his preliminary report rejected this impudent claim as being without the submission, his reasons therefor being stated in the following terms (Rec. pp. 658–659):

"In the account of both Messrs. Cherry and Schramme is an item of twenty-five thousand dollars for *special services in securing the settlement by arbitration*, making $50,000 in all. This was in the nature of a claim for loss of time on two trips to Bogota and for special services, which claim *was approved by the Board of Directors at a special meeting held February 15, 1897*. These two trips covered a period of nearly one year, during which time these officers were under salary, and as their traveling and subsistence accounts were also paid, *it places this sum in the class of a gratuity awarded to their officers* by the company for the faithful and delicate services which they had rendered and which they had richly merited, but, in the opinion of your chairman, *it does not constitute a necessary part of the expense of constructing the road* and was *not in existence at the time of the signing of the agreement and hence not subject to its conditions.* It must, therefore, be rejected from the award."

And he follows this with a copy of the resolution of the *Colombian Construction and Improvement Company* as follows:

> "[Resolved, 'That $50,000 be set aside to be paid to J. L. Cherry and C. F. Schramme for their lost time and extraordinary services rendered to *this* company during their two trips to Bogota in *effecting the present settlement*, to be equally divided between them.']"

In the discussion of Mr. Haupt's preliminary report by the vote of Messrs. Schramme and Haupt it was decided to adopt the conclusions of that report as the scope and meaning of the submission to arbitration (Rec. p. 703). Nevertheless, subsequently, Mr. Schramme asked to re-open the decision disallowing the claim of $50,000 and made the following observations thereon (Rec. pp. 719–720):

> "I would like to be heard on the proposition to disallow $50,000 compensation of Cherry and Schramme for their two trips to Bogotá and the work performed by them of an extraordinary nature. They certainly are entitled to extra compensation for this work, and the Colombian Government was fully aware of their demands, as is clearly shown by the letter of His Excellency President Caro to the U. S. Minister, and which letter is in evidence and uncontradicted. In this letter His Excellency does not repudiate their claim because being unjust, unwarranted or excessive, but because its acknowledgment would be prejudging the case, and that therefore the decision on this point must be left to the arbitrators. This shows conclusively that the Colombian Government was fully aware of this claim, and that the arbitrators have a perfect right to take it into consideration. The $50,000 was duly and *bona fide* paid by *our company*, and forms an item of expense incurred *in the construction of the Cauca Railroad*. The reason that *both Cherry and Schramme are salaried officers of the company*, and therefore not entitled to extra compensation, is, in my opinion, not a good one, because neither law nor common sense, unless specially agreed, would compel a salaried person to

perform outside of his regular work, duly defined by the by-laws, *extra work not bargained for*, such as leaving their homes and business for an indefinite period, risking their health and being in attendance day and night without due compensation. That this compensation could *only* be fixed and voted by the company after it had been performed, consequently after the arrangement of the Colombian Government had been made, is evident, and therefore should be no reason for its disallowance. Besides the minutes of the company duly show that Cherry and Schramme demanded extra compensation before entering upon their journeys to Bogotá, and that the company recognized their demand as just. It might, however, be claimed, and not without good grounds, that their salaries during the period of their absence should be deducted from the compensation granted them, and in that case $20,800 should be deducted from the $50,000, leaving thus a claim of $29,200, which should be allowed."

Mr. Haupt thereupon changed his ground and voted with Mr. Schramme to allow $29,200 of this claim (Rec., p. 725).

This claim of the *Colombian Construction and Improvement Company* to reimbursement for alleged compensation paid to certain of *its* officers, specially employed as counsel, agents, attorneys-in-fact, or what not, to secure an amicable compromise of the controversy between the Cauca Company and the Republic of Colombia, is held to be a sum expended by the Cauca Company on the—

> "works executed by it in the construction of the said railway and on the rolling stock, tools, etc., introduced for use on the said road."

This claim, which never took the form of an obligation of the *Colombian Construction and Improvement Company*, until *forty-two days after* the execution of the submission to arbitration, is held to be within the intention and contemplation of the Republic of Colombia when arranging and

executing a submission to arbitration of a controversy with the *Cauca Company*, and to be within the descriptive words of the agreement for submission.

What, if anything, the Colombian Construction and Improvement Company, or even the Cauca Company, might have seen fit to allow to Cherry and Schramme, *after* the execution of the submission, for services in securing it, was a matter wholly within the discretion of the company, and it might have allowed $5,000,000 with as much legality as $50,000, and to charge the Republic of Colombia with having executed an instrument which would have given free rein to *one of the parties to the submission*, or to a *stranger* to that submission, *forty-two days thereafter*, to do acts which would swell the liability of the Republic of Colombia, *at the discretion of such party*, would be to impute to the officers of Colombia an imbecility of mind sufficient to render their act void.

If the Republic of Colombia bound itself, in advance, to pay whatever such party or parties might *thereafter* see fit to create as a liability, there would be no limit to the amount for which it could be made liable, and there would be no reason why the Colombian Construction and Improvement Company need exercise any prudence in the matter of the allowance, as the Government, and not the company, would be the paymaster.

It is perfectly plain that the submission to arbitration concerned moneys already expended in the specific work, and of which the Government had a definite idea, as shown by its approximate estimate written on the face of the agreement for submission itself; and it is absurd to say that by the terms of that agreement for submission to arbitration it converted the Colombian Construction and Improvement Company not a party to the submission into a legislative body to usurp the functions of the National Congress and, at its will, to appropriate the funds of the national treasury, which is the precise legal effect of this pretentious claim.

The artful manner in which Schramme suggested the compromise of that claim showed his recognition of the ill-logic of his position. If the Republic of Colombia was liable for anything of that kind it was liable for the entire amount. If the Colombian Construction and Improvement Company was empowered, by Colombia and the Cauca Company, after the execution of the submission, to create liabilities for Colombia to pay, and did not see fit to set off against said claims of Cherry and Schramme the salary which they were authorized to receive during the same period, the Republic of Colombia could make no objection to that exercise of the company's discretion, and it was manifestly merely furnishing a cue to Haupt, under which he might find a pretext for a reversal of his former judgment.

The eighth item of $135,000, alleged price paid for the forfeited concession.

Among the claims allowed by the award is the sum of $135,000, the price which it is alleged was agreed to be paid to Cherry for the assignment of the concession.

On the face of the concession it appears by the thirty-fourth article that no assignment could be made except upon giving notice thereof to the Government (Rec. p. 34), and it has already been pointed out that this requirement was formally complied with on the 3d of August, 1891, by the formal notice to the Government of the assignment of the concession to the Cauca Company by an instrument executed on the 6th of April, 1891 (Rec. pp. 1212, 1213). This representation of ownership in the Cauca Company was continued by subsequent letters (Rec. pp. 1213, 1222), and up to and including the very moment of the execution of the agreement for submission, by the renewed assertion of the fact, by the Cauca Company, in its power of attorney of October, 23, 1895, under which Cherry executed in its behalf the agreement for submission (1226–1229–1207).

This is the only assignment in accordance with the requirements of the concession that was ever made, and the

only one of which the Government ever received any notice whatsoever.

As appears by the letter of Mr. Mallarino of August 3, 1891, the original assignment of the concession of April 6, 1891, of which the Government was given notice, was sent to the Minister of Public Works, but was required to be returned to the company (Rec. pp. 1212–1213), and as late as August 16, 1895 (Rec. p. 1222), Mr. Mallarino represents that he had previously sent the Government a copy, and offers to send a new copy. The original was, therefore, presumably in the possession of the company, but it was not offered in evidence, either in this cause or before the arbitrators, nor was any copy of it offered, nor any evidence given or statement made as to its contents, either in this cause or before the arbitrators. In fact, in the proceedings before the arbitrators, this assignment and the notice thereof to the Government (necessary to its validity and formally given as above shown) were carefully concealed, in order that a false and fraudulent use might be made of certain fictitious papers which were and are absolutely void. The only evidence given of the real and valid assignment of the concession is that offered by the complainant in this cause by the letters to the Government from the agent of the company and of Cherry (Rec. pp. 1212–13–22). Notwithstanding this formal assignment of the concession to the Cauca Company on the 6th of April, 1891, and the formal notice to the Government on the 3d of August, 1891 (Rec. pp. 1212–13), and notwithstanding the fact that the agreement for submission is wholly between the Government on the one part and the Cauca Company, as assignee of the concession, of the other part, the defendants, in the second paragraph of their cross-bill (Rec. p. 1082) ignore the assignment made on April 6, 1891, the only one of which notice was given the Government in accordance with the thirty-fourth article of the concession, and set up as an assignment to *both* the defend-

ants the two instruments dated November 29, 1890, made Exhibits 7 and 8 to the original bill (Rec. pp. 44–49). No notice was given the Government of either of these instruments, one of which does not even mention the concession, and both of which were and are void in law and could not be the foundation of any rights.

The first (Ex. 7, Rec. pp. 44–45) is between Cherry and the Cauca Company, dated and executed November 29, 1890, the same day the certificate of incorporation was issued (Rec. p. 40), and undertakes to assign to the Cauca Company the concession. It purports to be executed in behalf of the Cauca Company by Robert W. Patterson, as president, and by George Russell as secretary.

The second instrument (Ex. 8, Rec. pp. 47–49) is between Cherry and the Colombian Construction and Improvement Company, dated and executed on the 29th of November, 1890, the same day its certificate of incorporation was issued (Rec. p. 44). This agreement pretends to assign to the Colombian Construction and Improvement Company a contract between Cherry and the Cauca Company described as "bearing date on the ——— day of November, 1890," and without further or other description or identification. By it the Colombian Construction and Improvement Company agrees to pay Cherry $1,880,000 in shares of its full paid capital stock, also in certain methods, and within four years the sum of $135,000 (Rec. p. 48). In consideration of the agreements of the company, Cherry agrees to return to the company $800,000 of full paid capital stock of the company.

The concession is not attempted to be assigned nor mentioned in this agreement (Rec. 48).

The agreement purports to be executed by the Colombian Construction and Improvement Company, by H. A. Richardson, president, and C. F. Schramme, secretary (Rec. p. 49). As appears, by inspection, the first of these agreements (Ex. 7, Rec. p. 44) does purport to assign the concession, but not for the sum of $135,000, as allowed by the arbitrators, but "in

consideration of mutual promises and agreements hereinafter contained" (Rec. p. 44), no one of which is pecuniary.

It was invalid as an assignment of the concession, because the Government was never notified of it, as required by the thirty-fourth article (Rec. p. 34).

It was and is absolutely void for any purpose whatever for another reason which will be hereafter stated.

The second agreement (Ex. 8, Rec. pp. 47–49) as appears by inspection does not purport to assign the concession, and is invalid for that purpose:

1. Because it does not attempt to assign it;

2. Because even if it attempted to assign it no notice of it was ever given to the Government as required by the thirty-fourth article of the concession (Rec. p. 34); and

3. Because it was and is absolutely void for any purpose.

The agreements of November 29, 1890 (Ex. 7 and 8, Rec. pp. 44–49) are absolutely void.

It is to be observed that these contracts are contracts of corporations created under the laws of the State of West Virginia (Rec. pp. 37–44), and purport to be executed by certain persons claiming to be president and secretary thereof, respectively (Rec. pp. 45–49).

The certificate of incorporation of the Cauca Company was issued on the 29th of November, 1890, by William A. Ohley, Secretary of State (Rec. p. 40), and that of the Colombian Construction and Improvement Company was issued by the same officer on the same day (Rec. p. 44).

The code of West Virginia, under which these corporations were created (the material provisions of which are printed in the appendix to this brief) fixes the manner and time of organizing and officering the corporations.

Section 50 of chapter 53 provides that the *board of directors* shall choose *one of their own body* president of the corporation.

Section 15 of chapter 54 provides that when a certificate

of incorporation is issued under the 9th section the corporators named in the agreement recited therein, or a majority of them, shall appoint the *time and place* for holding a general meeting of the stockholders *to elect a board of directors*, make by-laws and transact any other business which may lawfully be done by the said stockholders in general meeting. The *time* appointed for the meeting *shall not be less than twenty-one days* nor more than ninety days *from the date of the certificate* and *at least two weeks' notice* of said meeting shall be given by advertisement, etc.

It is therefore plain that under the positive prohibition of the law of the State by which these two defendants were incorporated, they were without the legal power to have a board of directors or a president on the very date of the issuance of the certificate of incorporation, because the statute requires that the president should be elected from among the directors, and the directors should be elected by the stockholders at a meeting to be held *not less than twenty-one days after* the issuance of the certificate.

As a corporation can only make contracts through its officers, and as these corporations were in an inchoate state, incapable of having any officers, it was a legal impossibility for them to make either of these contracts relied on by the defendants in the second paragraph of their cross-bill; and the said pretended contracts were mere void and fictitious instruments which were used before the arbitrators, as is alleged in the eighth paragraph of the bill, as part and parcel of a scheme to cheat and defraud the complainant.

Hitchcock v. Galveston, 96 U.S. 341, 345; Thomas v. Richmond, 12 Wall. 349, 355; Ins. Co. v. Earle, 13 Pet. 519, 587; Waterman-Waterbury Mfg. Co. v. Texas Oil Co., 177 U.S. 28, 44

Even had the Cauca Company the capacity to contract on the date of its creation, in defiance of the law under which it was created, the failure to give notice to the Government, as required in the thirty-fourth article of the concession, would have invalidated the pretended assignment to it. The facts that it subsequently accepted from Cherry another assignment of the contract on the 6th of April, 1891, and

formally notified the Government thereof on the 3d of August, 1891, and transmitted to it the deed of assignment of that date (Rec. pp. 1212–1213), superseded and annulled any antecedent assignment, whether valid or invalid, as between the parties to it.

There could not be *two* valid assignments of the same concession between the same parties subsisting at the same time, as the later one would necessarily supersede the earlier. *A fortiori* must this be so as between the concessionary and his assignee, on the one part, and the Government on the other, when the *later* assignment was, in conformity with the thirty-fourth article of the concession, formally notified to the Government and the *preceding* one was not.

So, also, if the pretended agreement between Cherry and the Colombian Construction and Improvement Company, executed on the date of the creation of that company by a pretended president, could have any validity and could by its terms be said to operate as an assignment of the concession (which it does not purport to assign nor even mention), still it would have been invalid as an assignment of the concession because of the failure to notify the Government as required by the thirty-fourth article.

But even if these defects were not absolutely fatal to its validity, the subsequent assignment on the 6th of April, 1891, formally notified to the Government on the 3d of August, 1891, and confirmed by subsequent notices up to and including that contained in the power of attorney under which the agreement for submission to arbitration was executed, would have necessarily superseded and annulled that agreement and of necessity would have superseded and annulled any and all attempted or pretended assignments of the concession made previous to the formal notice to the Government of August 3, 1891.

It is manifestly impossible that there could have been a valid and subsisting assignment from Cherry to the Colom-

bian Construction and Improvement Company of the 29th of November, 1890, *without* notice being given to the Government, and also a valid and subsisting assignment from Cherry to the Cauca Company of the 6th of April, 1891, of which the Government *was* given notice.

It is an undisputed and indisputable fact in this case that on the 3d of August, 1891, the government was formally notified of the assignment of the concession on the 6th of April, 1891, by Cherry to the Cauca Company and the deed of assignment transmitted to it for its information (Rec. pp. 1212–13).

Certainly the Government had the right to rely upon the formal notice so given on the 3d of August, 1891 (Rec. pp. 1212–13), of the assignment to the Cauca Company of the 6th of April, 1891 (Rec. pp. 1212–13), and continuously represented by the Cauca Company to be subsisting up to and including the moment of executing the submission (Rec. pp. 1213, 22, 26).

Under these circumstances the Cauca Company was estopped in the arbitration proceedings, and is estopped in these proceedings, to set up an *antecedent* assignment of the 29th of November, 1890, to the Colombian Construction and Improvement Company, of which it had given no notice.

Cherry, the attorney in fact of the Cauca Company, and Schramme, the arbitrator, in the proceedings before the arbitrators were both represented to be officers of the Colombian Construction and Improvement Company, and the fact that the one signed the submission, as attorney in fact for the Cauca Company, and the other accepted the post of arbitrator on behalf of the Cauca Company alone, under an agreement which does not even mention the Colombian Construction and Improvement Company, makes it impossible that that company could be considered or set up as an assignee of, or as having any rights in the concession or in the arbitration.

It is therefore demonstrable that both of these instru-

ments of the 29th of November, 1890 (Rec. pp. 44–49), are nullities, at least as to the Government and the arbitration proceedings.

The claim for one hundred and thirty-five thousand dollars based on the alleged assignment of the concession is fraudulent.

In view of the precise procedure required for a valid assignment of the concession under the terms of its thirty-fourth article, any honest transaction by which the concession was assigned for the sum of one hundred and thirty-five thousand dollars, or any other amount, would have been susceptible of direct proof of an unequivocal character.

Yet true it is that the proceedings before the arbitrators and the facts established in the testimony in this case show an extraordinary duplication and confusion of assignments of the concession which can have no other explanation than the existence of a deliberate purpose to conceal, mislead, and to perpetrate a fraud.

The record before the arbitrators, and in this cause, shows no less than *three* instruments of assignments by the same person (Cherry) to the same company (the Cauca Company) of the same concession between November 29, 1890, and April 6, 1891.

Two assignments of the concession, both from Cherry, and both to the Cauca Company alone, were presented before the arbitrators. One of these is the alleged assignment (Ex. No. 7, Rec. pp. 44–47), dated and executed on the 29th of November, 1890, which has already been considered.

The other is entitled "Deed of Transfer" (Rec. pp. 793–797); this is dated December 30, 1890; executed by James L. Cherry, by his attorney, D. Calman, and by the Cauca Company, by Richard W. Patterson, president. It recites that it was authorized by—

"a meeting of the directors of the company, called

> the Cauca Company, held in this city on the 10th instant" (Rec. p. 793)—

which was ten days before the Cauca Company could, under the law of its creation, lawfully have any directors.

By this instrument Cherry, through his attorney—

> "assigns and transfers for the sum of *fifty thousand dollars* and other valuable considerations, unto the aforesaid Cauca Company, all the rights, titles, actions, and claims that said James L. Cherry may have by reason of the aforesaid contract, which transfer he makes absolute" (Rec. p. 794).

This instrument also recites that it "is to be registered at the proper office in the city of Bogotá (Rec. p. 794).

Counsel for complainant confesses an inability to comprehend what purpose this paper served before the arbitrators, but certain it is that it shows no payment of, nor obligation to pay, *one hundred and thirty-five thousand dollars*, the amount allowed by the arbitrators for the cost of the concession, and can not possibly support that allowance.

By the evidence taken in *this cause* it appears (Rec. pp. 1212, 1213, 1222), that on the 6th of April, 1891, Mr. Cherry executed a *third* assignment of the concession to the Cauca Company, which was formally presented to the Government on condition of its return to the company, and an authenticated copy thereof was subsequently delivered to the Government.

The consideration, if any, named in this last assignment is not disclosed by the record, as the assignment itself was not offered in evidence either before the arbitrators or in this cause.

No explanation is made, either before the arbitrators or in the evidence in this cause, why Cherry should have *three times* assigned the concession to the Cauca Company, namely, on the 29th of November, 1890, on the 30th of

December, 1890, and on the 6th of April, 1891; nor is any explanation offered of the circumstance that of the *three* assignments the Goverment was notified of but *one*, and that the latest (the one of the 6th of April, 1891); nor is any explanation offered of the circumstance that of the *three* assignments the only one *not* presented to the arbitrators and *not* appearing in this record is the one of which the Government *had* notice.

The assignment of the 29th of November, 1890, presented to the arbitrators, named no pecuniary consideration, while that of the 30th of December, 1890, executed in the most formal manner, named a consideration of $50,000. Both of these were ignored by the arbitrators, who undertook to award $135,000, a sum, which as shown, does not appear in either of these assignments and is named in no document in the record except the invalid agreement between Cherry and the Colombian Construction and Improvement Company as a *part* of the consideration for the various agreements in that contract set forth, but having no relation to and not mentioning the concession.

It is inconceivable that Mr. Arbitrator Schramme, so intimately connected with all these transactions and so beneficially interested in this award, should not have known of these several assignments of the concession and should not have known that the two assignments presented to the arbitrators had been withheld from the Government, while the one presented to the Government was withheld from the arbitrators; and while Mr. Haupt may have been honestly confused, by this mixture of documents, it is inconceivable that Mr. Schramme, informed and interested as he was, could have been actuated by any other motive than a fraudulent purpose to swell the amount of the award for the benefit of himself and associates, by the misuse of these fictitious documents, an inference which is strengthened by the circumstances that, though he attended all the sessions of testimony in this cause (Rec. pp. 1117, 1230, 1265), he did not testify.

The alleged price of the concession was not a proper subject of allowance under any circumstances.

Had there been a plain and unambiguous assignment of the concession by Cherry to the Cauca Company for the sum of $135,000, it would not have been such an expenditure by the Cauca Company as to fall within the terms of the submission.

What is the concession?

It is not a work or labor executed in the construction of the road. It is not any part of the rolling stock, tools, etc., used on the railroad.

It is a contract, by which the concessionary agreed absolutely to build 85 miles of railway, in consideration of which certain privileges, advantages, and subsidies were agreed to be granted by the Government.

The Government received no compensation for the concession unless the concessionary built the road, and the concessionary could not earn the concession until he built the road. The right of the concessionary, until the road was built, was merely the right to *earn* the concession, while if he failed to build the road within the stipulated time he lost, not only the concession, but so much of the road as had been built.

By the act of Congress of Colombia, authorizing this submission, it was made an express condition that the concessionary, the Cauca Company, the then owner of the concession, should absolutely renounce the concession. This was a condition precedent, fixed by the Congress, upon any adjustment of the controversy, and was accepted in terms by the company in entering into the submission.

The concession was in no sense a part of the *cost* of the road to the concessionary, but, on the contrary, was *compensation* to the concessionary and a *cost* to the Government. The Government agreed to pay for the construction of the road by means of the concession, instead of by means of a cash outlay to the contractor.

By the terms of the concession, the contractor was bound to build the *entire* road out of his own means, to

supply the necessary labor, material, and money to complete the project, and was to receive, in payment, the privileges embraced in the concession.

By the terms of this submission, the concession was to be surrendered, and in lieu of payment for construction through the *concession*, the contractor was to be paid in *money* the cost of construction.

By the terms of this award, the Government is required to pay the cost of constructing the road, and in addition over $188,000 of salaries, traveling expenses, New York office expenses, and gratuities of the stranger corporation; and over and above all that is added $135,000 for the unearned, forfeited, and surrendered concession.

Had the contractor fulfilled his contract, by building the *entire* road, his reward would have been the concession *minus* the cost of construction, which in any event he was bound to pay; but by the course of this arbitration, affirmed by the decree below, the contractor gets the *entire* concession for building *part* of the road *plus* the cost of its construction and numerous bonuses besides.

In other words, the interpretation given to this submission to arbitration is, that by it the Government intended to confer on the defaulting concessionary who had built but a little more than five miles of road, greater advantages and rewards than if he had completed his entire contract, whereas the plain purpose of the submission was to take back the concession, terminate the contract, and to substitute for the concession a payment to the contractor in *money* for the work, labor, material, rolling stock, tools, etc., actually contributed by him to the construction of so much of the road as he had built.

The third and fourth items being salaries and traveling expenses.

The items of salaries to Cherry and Schramme aggregate $108,181.42, while their traveling expenses allowed amount

to $29,386.30, in all the munificent sum of $137,567.72 to Cherry as president and Arbitrator Schramme as treasurer of the *Colombian Construction and Improvement Company* (Rec. p. 240), *not a party to the submission.*

Attention has already been called to the peculiar character of the Colombian Construction and Improvement Company and to the varied and extensive range of the business authorized by its charter, but none of which concerned the construction of the Cauca Railroad. It is also to be remembered that the railroad construction done amounted only to a trifle over five miles, the total cost of which is stipulated at $233,909.14, so that the extravagance of this allowance, as compared with the work of construction, is so gross as of itself to suggest fraud or dense ignorance.

But the radical defect in these allowances is that they concerned the expenditures of a stranger to the submission. They were the alleged salaries and traveling expenses of officers of the Colombian Construction and Improvement Company.

The Cauca Company did not engage to pay the salaries and traveling expenses of the officers of the Colombian Construction and Improvement Company, nor did those officers have any concern with the construction of the railroad which was in the hands of the Cauca Company, the compensation of whose officers is embraced in the stipulated cost of the road.

The Colombian Construction and Improvement Company might have voted these persons salaries aggregating a hundred million dollars, but it could have imposed no obligation upon Cherry or his assignee of the concession, the Cauca Company, to pay them. As a matter of fact, demonstrated by the record, the Cauca Company had no more to do with them and no more responsibility for these alleged salaries and expenses than if these officers had never been born and their company never created.

The complainant never agreed to submit to arbitration the question of the liabilities of the Colombian Construction and Improvement Company to its officers or to pay any such when ascertained. These claims are as plainly *res inter alios* as is possible.

The sixth item being New York office expenses and sundries and incidentals.

These items of $16,605.10 and $5,122.48, aggregating $21,727.58 are the alleged New York office expenses and sundries and incidentals of the *Colombian Construction and Improvement Company*, and are, of course, outside the submission. Neither the Government of Colombia, the concessionary Cherry or his assignee, the Cauca Company, contracted or agreed to pay one dollar of this money. They are also *res inter alios*.

The record will be searched in vain for a suggestion of any contractual relation between the two companies, or for any fact or circumstance which could make the Cauca Company liable for any expenditures or obligations of the Colombian Construction and Improvement Company.

The real reason for attempting to charge these alleged disbursements of the Colombian Construction and Improvement Company to the Government by means of this arbitration with the Cauca Company is to be found in the fact disclosed by the answer of the two defendants to the eighth paragraph of the bill (Rec. p. 892)—

> "*that the parties in interest holding the stock of the Cauca Company are the stockholders of the Colombian Construction and Improvement Company.*'

Whatever obligations of the latter company these "parties in interest" could foist upon the Government, as claims of the Cauca Company, would by that means enure to the benefit of these "parties in interest" who are the stockholders of the Colombian Construction and Improvement Company. Hence, in the proceedings before the arbitrators the effort

was made, as those proceedings disclose, to saddle the Government with the entire financial obligations of the Colombian Construction and Improvement Company, even including its stock and bond ventures.

This whole scheme of including in the award alleged expenditures of the Colombian Construction and Improvement Company is thus seen to be a palpable fraud, by which claims of a stranger to the arbitration were admitted and allowed to the party to the submission for the ultimate advantage of the stockholders of the stranger company.

Not being within the terms of the submission, all the items in dispute were without the jurisdiction of the arbitrators, and the award is, for that reason, invalid.

The Authorities as to the Nullity of an Award Outside the Submission.

The authorities are uniform in holding that if the arbitrators act in excess of their powers, if they consider and make their award as to matters not submitted, their award is void.

Leslie *vs.* Leslie, 50 N. J. Eq. 107 (affirmed by the Court of Errors and Appeals, 52 N. J. Eq., p. 332):

> "The doctrine is obviously fundamental that it is essential to the validity of an award that it be confined to those things which, by the agreement of arbitration, are submitted to the judgment of the arbitrators, and that it shall not extend to those which are not within the terms of the submission. Caldwell says it is one of the requisites of a valid award that it be consonant to the submission. Caldw. Arb. 226–227."
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> . . . . . .
>
> "Nothing, it seems to me, can be clearer, both as a principle of sound law and of plain natural justice, than that where two persons submit, in plain and clear terms, one particular dispute or controversy to the determination of a third, as their judge, his

> authority must be considered to be inflexibly limited to a decision of that one particular matter, and that any attempt by him to pass judgment upon any other question must be held to be unauthorized and beyond his power and consequently without the least legal force. The submission is the commission of the arbitrator."
>
> . . . . . .
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> "The parties, in creating such a forum, are at liberty to create it for a special designated purpose or for all purposes. No person should, therefore, be bound by the judgment of such a tribunal on a question which he had never consented that it should decide. As to both parties, the judgment of such a tribunal on a question entirely outside of the matters submitted, is a mere act of usurpation and hence without the least force."

Poland, C. J., in Cook *vs.* Carpenter, 34 Vt. 126, says:

> "An arbitration or reference under a rule of court stands upon the same general principle, as do all arbitrations, the mere agreement of the parties; and the power of the arbitrator or referee extends to just what the parties have agreed to submit, and no more; and if he undertakes to try an award of other matters not submitted, the award is invalid."

The Supreme Court of New Hampshire, in the case of Adams *vs.* Adams, 8 N. H. 91, uses the following language:

> "The equity of the claim can not change its nature in this respect. In the next place, there is a wide difference between a case where referees undertake to decide equitably a claim submitted to them, and a case where they undertake to decide a claim not submitted to them, merely because it is equitable. Neither law nor equity can give them authority to decide a claim not submitted. They derive their authority from the agreement of the parties, and not from the justice or equity of the claims laid before them."

In Gilmore *vs.* Hubbard, 12 Cush. 221, the Supreme Court of Massachusetts says:

> "In the present case, the court are of opinion that the arbitrators exceeded their authority in finding and reporting a balance due from Gilmore and Carpenter to the estate of Belknap, and their award in this respect was a nullity."

In Sawyer *vs.* Freeman, 35 Me. 546, the Supreme Court of Maine says:

> "The decision of the arbitrators, that a matter does come within the terms of the submission, can not be conclusive of the fact. If it could, all matters would be included which they pleased to consider to be so, however at variance with the terms of the submission and contrary to the intent of the parties to it.
>
> "When the amount included in an award by excess of authority can not be ascertained and separated so as to leave the rest part unaffected thereby, the whole award is void. Boynton *vs.* Frye, 33 Me. 216."

In Wyman *vs.* Hammond, 55 Me. 537, the court says:

> "It is undoubted law that the award must follow the agreement of submission. It must determine the question submitted. The arbitrator can not assume to determine points not fairly included, expressly or by necessary implication, in the submission. If he does his award, as to such points, is invalid and not binding on the parties. It is unnecessary to cite authorities on this point."

In Swann *vs.* Deem, 4 W. Va. 369, the Court of Appeals says:

> "The plaintiff's demand, as described in his declaration and bill of particulars, was the only matter of dispute arising in the case, and consequently the only matter submitted to arbitration. The award of the arbitrators is, consequently, not within the submission, and should not have been entered up as the judgment of the court."

In Dunlop *vs.* Campbell, 5 W. Va. 197, the court says:

> "Arbitrators have no powers except those delegated to them in the submission. Their award must therefore be limited to such matters as are submitted to them. If they exceed the limit of the submission, they act without authority and in the assumption of powers not delegated, vitiate the award."

In Gibson *vs.* Powell, 5 Sm. & M. (Miss.) 726, the Supreme Court says:

> "By the terms of the submission the arbitrators were confined to the differences which existed in reference to the two promissory notes; but the award directs that James Powell, a total stranger to the submission, should pay a large portion of the balance due on the notes by making a deed to certain mills with the appurtenances; and that the remainder should be paid, part by Herman Powell and part by Bennett. And it also disposes of a quantity of lumber and a stock of hogs. An award must always be in strict accordance with the submission, and not extend to subjects not submitted, nor to strangers to the submission. It must also be certain and material. Kyd on Awards, 103, 129. And if it lack any of these important requisites it is void. The arbitrators act under a special authority for a particular purpose and the authority must be strictly pursued."

The Appellate Court of Illinois, in Glade *vs.* Schmidt, 20 App. Ct. (Ill.) 160, holds that an award beyond the submission is void, and that parol evidence to show the fact is admissible in a direct proceeding to set aside the award.

In Carmack *vs.* Grant, 5 Littell (Ky.) 33, the Court of Appeals says:

> "There are various objections taken to the award by the assignment of errors. Most of these might, perhaps, be gotten over; but there is one of them which is obviously insuperable, and from the fatal character of this objection it is unnecessary to notice the others. The objection to which we allude is, that

the arbitrators exceeded their authority in awarding payment of the rent for the year 1819."

. . . . . .

"It is evident that the rent for the year 1819 was not a matter in controversy in this suit, and of course was not submitted to the decision of the arbitrators."

In Lynch *vs.* Nugent, 80 Iowa, 431, the Supreme Court says:

"The arbitrators stepped somewhat aside to render some unsolicited service by way of promoting harmony, and decided some questions not submitted, and have given some advice unasked, and in this respect it is said that they exceeded their authority; and it is true, but their acts in this respect are only void."

In White *vs.* Arthur, 59 Cal. 33, the Supreme Court says:

"The rule seems thoroughly established by the precedents, and it is certainly consonant with principle, that an award which goes clearly beyond the issues limited by the submission, and is, therefore, in excess of the power conferred on the arbitrators, is invalid as a whole, when the matter *ultra vires* can not be separated without violating the plain intention of the parties."

In Reynolds *vs.* Reynolds, 15 Ala. 398–403, Collier, C. J., says:

"It is well settled that an award must conform to the submission under which it is made. . . .

"If, therefore, arbitrators transcend their authority *pro tanto* their award will be void, and will stand good for the residue, unless that which is void affects the merit of the submission so that it can not, without injustice, be separated from it; but if it forms the consideration for what the other party is required to do, the award will be void in toto."

In Butler *vs.* Mayor, 7 Hill, 330, the Court of Errors of New York says:

"The submission of this case is very particular, and is limited to the appraisement of the diminished or increased cost consequent upon any alteration in the form, proportion or construction of the building called the 'Halls of Justice.'

"Nothing is more clear than that the power of arbitrators or an umpire does not extend to any matter or thing not included in the terms of the submission. It is evident from the face of this award that the terms of submission have not been complied with. The arbitrators determined that the plaintiff is entitled to receive from the Mayor, Aldermen and Commonalty of the City of New York, the sum of $2,385.29, for the increased cost of said buildings, after he shall have filled up the outside paved way. This later provision is clearly out of the submission and is void.

. . .

"There was no power delegated to the arbitrators except to declare the appraised value on the increased or diminished cost of the alteration in the plan and construction of the building. . . .

"The plaintiff offered to prove on the trial that the arbitrators had allowed against him a large sum for defective workmanship in those parts of the building which had not been altered in form or construction. If this was so, most indubitably the arbitrators judged and determined upon a matter not submitted to them, and the plaintiff is not bound by the award. In such case it is void, both in law and in equity, and the party is unquestionably entitled to some remedy."

In the case of Bullock *vs.* Bergman, 46 Md. 277, the Court of Appeals says:

"Several objections are made to the award, one of which is 'that the arbitrators proceeded beyond the articles of submission and determined upon matters not left to their judgment.' As we are of opinion that this objection is well taken and is fatal to the validity of the award, it is unnecessary for us to notice the other objections urged by the appellee and argued by counsel."

. . . . . .

"While courts regard awards with favor, and every

intendment is made for their support, as was said in Caton *vs.* McTavish, 10 G. & J. 193, Ebert's Executors *vs.* Ebert's Admrs., 5 Md. 353, and in Robeson *vs.* Carson, 8 Md. 208, yet it is well settled that they can not be supported, if the matters awarded are not within the terms of the submission; the parties are not bound except by their agreement, and the decision by arbitrators of any matter not referred to them and beyond their authority vitiates the award, unless that part of it which is outside of the submission can be separated from the rest."

The Supreme Court of the United States has twice declared the same doctrine:

McCormick *vs.* Gray, 13 How. 35–39.

DeGroot *vs.* United States, 5 Wall. 419.

IV.

Error in Holding That Upon the Resignation of One Arbitrator the Others were Competent to Make an Award Before the Vacancy Had Been Filled.

The Fifteenth and Sixteenth Errors Assigned.

This proposition does not involve the question whether a majority of these arbitrators concurring could make a valid award, but presents the question whether under the terms of *this submission* and before the completion of their labors, one of the arbitrators having ceased to act, the party appointing him had the right to fill the vacancy thus caused, before the remaining arbitrators closed the proceedings, made up the award and dissolved by adjournment *sine die*.

By the sixth article of the agreement for submission it is provided that (Rec. p. 1209):

> "Should any of the members of the Commission decline or resign the charge, or cease to act for any reason, the proceedings of the former shall not be thereby invalidated, but its integrity shall be restored

> by new appointment, to be made by the party naming the missing member within thirty days, reckoned from that on which such default occurs. Should such party not comply with said obligation, the Secretary of State of the United States of America and the Minister of Colombia in Washington shall by common accord proceed to name the person who shall fill the vacancy."

On the 30th day of August, 1897, the arbitrators took advantage of the provision of article 8 of the submission and extended the time of their sitting for sixty days from September 1, 1897 (Rec. p. 602).

On October 22, 1897, Mr. Peña *resigned* (Rec. pp. 732–3), and on the same day when requested to appear and act as an arbitrator he *refused* (Rec. p. 1270), and thereafter "ceased to act."

At the time of Peña's resignation and refusal to act, the arbitrators still had eight days of the time fixed by the submission within which it could sit, and within which Colombia had the right under the sixth article to appoint a successor to Peña. No attempt was made by the Cauca Company or the arbitrators to have Mr. Peña's place filled, and no notice given of the purpose of the remaining arbitrators to proceed, but at 5.15 P. M. of said day, or less than three hours after Peña's refusal to attend, the award in controversy was executed by the two arbitrators and the arbitration adjourned by them *sine die* (Rec. p. 746).

Recurring to the sixth article of the agreement for submission it is seen that—

> "*Should any of the members of the Commission decline or resign the charge or cease to act for any reason . . . its integrity shall be restored by new appointment*" (Rec. p. 1209).

Not only is a Commission consisting of three persons constituted, but the agreement contains a specific provision that

it shall not be *less* than three, and provides in detail for the method of keeping it up to that number.

Indeed this provision was necessary to prevent the failure of the arbitration in the event of a single death, disability or resignation. The law positively requires that, where a submission is made to a number of persons to act jointly, all must act together and continuously up to the end or their proceedings are void.

The rule in submissions of this sort is thus stated in Morse on Arbitration and Award (p. 151):

> "All the arbitrators must act together during the proceedings. It is an *imperative rule* that where the submission is to several arbitrators jointly, *all must act together during the proceedings.* English and American authorities are alike agreed upon this. *All must be present throughout each and every meeting, equally whether the meeting be for hearing the evidence or arguments of the parties or for consultation or determination upon the award.* The disputants are entitled to the exercise of the judgment and discretion, and to the benefit of the views, arguments, and influence, of each one of the persons whom they have chosen to judge between them; and *they are entitled to these, not only in the award, but at every stage of the arbitration.*"

The decided cases are also to the same effect.

In Brower *vs.* Kingsley, 1 Johns. Cas. 334 (1800), the report of referees was set aside for the reason that after the time limited in which they were to report two of them, without notice to the third, met and made their report, on the ground that the third by "his assistance might have changed their opinion and produced a different result" (p. 335).

In Harris *vs.* Norton, 7 Wend. 534 (1832), the court set aside a report of referees on the ground that, on the day appointed for the hearing only two of the three referees appeared and adjourned the hearing to a future day, although

on that day all the referees attended and heard the plaintiff's proofs, Nelson, J., saying:

> "Referees have no power to act unless all attend. The concurrence of two, had the third been present, would have been enough, but only two attending, they could not do any act affecting the rights of the parties."

In Russell on Arbitration the rule is laid down as follows (p. 209):

> "As they must all act, so must they all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow judges, so that by conference they shall mutually assist each other in arriving together at a just decision."

Cresswell, J., *in re* Beck and Johnson, 1 C. B. N. S. 695, 700, quotes this language, basing upon it his decision in setting aside the award of two out of three arbitrators rendered without the presence or assistance of the third.

In Little *vs.* Newton, 2 Mann. & Gr. 351, matters in dispute had been referred to three arbitrators, any two of whom were empowered to render an award. All three of the arbitrators met, heard and considered the evidence, and two of them agreed on this award subject to the opinion of one of them, a barrister, on a question of law, which the third arbitrator also agreed to leave to the barrister. The barrister, after considering the question of law, drew and signed the award in Birmingham and sent it to London, where one of the other arbitrators executed it, the third not seeing it, but being refused permission to look at it.

Tindall, C. J., set th[illegible]ward aside, saying (pp. 361, 362):

> "It is quite [illegible]hat the parties to a submission to a reference [illegible] right to the joint judgment of

the two arbitrators who sign the award, upon each and every point embraced by such award, after communication had between them so as to insure an agreement of mind between them, upon each point, before the signing of the award. But in the present case, the determination of the point of law appears to have been the judgment of the legal arbitrator alone, who made no communication whatever of the conclusion at which he had arrived to either of the two other arbitrators, but inserted his own determination in the award, and signed the same before any such agreement had taken place. The award, thus prepared and signed by one arbitrator, was afterwards signed by another of the arbitrators; but was never shown at all to the third arbitrator, until after it had been published. It is true that both arbitrators, named by the plaintiff and defendant, respectively, had declined to interfere on the question of law, and had given up their opinion to that of the third. But there is no principle of law, that we are aware of, which will authorize any such delegation of the judicial authority conferred upon the three; and it is impossible to say that, if the determination of the legal arbitrator had been disclosed to either of the other arbitrators before the signature of the award, some argument or observation might not have been made which would have led to a different conclusion."

In Lord *vs.* Lord, 5 Ellis & B. 404, Coleridge, J., delivering the opinion of the court, says (p. 406):

> "It is now clearly established that every judicial act, to be done by two or more, must be completed in the presence of all who do it; for those who are to be affected by it have a right to the united judgment of all up to the very last moment."

In Hoff *vs.* Taylor, 2 Southard (N. J.) (1820) 829, matters in dispute were referred to three arbitrators with the right in any two of them to make an award. Two of the arbitrators met, heard evidence, and formulated an award, the third, who represented the losing party, *refusing to attend*,

though notified. Southard, J., in holding the award to be invalid, says (p. 832):

> "When a man refers a matter to three he does not say, nor mean, two. When he takes his cause from the court and places it in the hands of private individuals he does it because he has confidence in their intelligence and integrity; and it may, and often does happen, that he has full and implicit reliance upon one only of the persons chosen, and that reliance governs him in agreeing to the rule. Would he consent to the reference, if he understood that he was to be bound in every event, *even if that man refused to act? Surely not.*"

Moore *vs.* Ewing, Coxe (N. J.) 144, was a motion to show cause why two awards between the same parties should not be set aside. The submission was to five arbitrators, a majority of whom could decide, and the awards were both unanimous and in favor of the defendants. After hearing the parties and determining upon their decision the arbitrators directed the counsel of the prevailing party to formulate the award in legal language, but, after it was committed to writing, though each of the arbitrators signed it, they did so separately, without ever again meeting. Kinsey, C. J., set the awards aside on the ground that the arbitrators should have met to execute the award, saying (p. 147):

> "But there appears another objection arising on the facts proved, not mentioned in the argument, but which is material in determining the present motions. The question I mean is whether an award thus drawn up, carried separately to each of the arbitrators—separately examined and signed by them, is such an award as ought to be confirmed."
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> . . . . . .
>
> (p. 148) "It appears that the arbitrators did examamine jointly, and did form a joint determination in favour of the defendant, and it may be objected that *the executing the award is but a mere formality. But we think otherwise.*

"1st. Though the arbitrators had agreed on an award in favour of the defendants, yet they can not be said to have agreed to an award not then drawn but left to be drawn up by the counsel. They never did, nor could agree to any award that should be drawn; the approbation of the report then, when placed on paper by the counsel, and drawn up with the necessary legal formality, when shown to them afterwards, was an act of judgment, and according to the cases cited, should have been a joint act.

"2d. It is not only a judicial act but also a material part of their business. Mr. Leake might have drawn twenty reports, and any one of the arbitrators had a right to exercise his judgment on each, and to reject all or any of them."

. . . . . .

(p. 149) "The tenor of the rule of reference proves that the authority was delegated, that it should be exercised jointly and not separately. An adherence to the rule in the case of awards will be of real service. It will prevent and be a guard against imposition and fraud. When arbitrators meet and act together upon any part of their judicial business, they stand as guards on the conduct of each other; they have an opportunity of proposing their own difficulties and doubts, and hearing those of their associates; to hear and weigh the reasons given, and to form a judgment with the greatest possible advantage. All the books suppose the acts of arbitrators to be performed jointly; separate meetings have always been disapproved of; want of notice of meeting is one of those irregularities laid down as sufficient to vacate an award made under a rule of court.

"If we wander from the strictness of the rule that has been laid down, viz., that in the execution of judicial powers all must join, where shall we stop? If the referees may separately approve of and execute an award, upon what possible grounds can they be prevented from inquiring and coming to a determination separately. On the contrary, if we adhere to the rule throughout, the consequence will be as Lord Kenyon says in The King *vs.* Forrest (3 T. R. 40) (a

> case similar in its nature to those before cited), the arbitrators will be able 'to assist each other, and the result of their conference will be the ground of their determination.'"

The Arbitral Consideration Not Completed at Time of Peña's Resignation, Items now Composing the Award Having Been Reserved for Further Conference.

It was contended by the defendants that the arbitrators' work had been completed and there only remained the formal rendition of their decision in the form of an award at the time of Peña's resignation (Defts.' Ans., par. 17, Rec. p. 886).

If this were a correct statement of the fact it would not remove the objection to the validity of the award.

> Moore *vs.* Ewing, Coxe (N. J.), 144–148.

But this contention is erroneous.

The said pretended award is not only not the act of the Commission in that it is the act of but two members thereof, but the said award comprehends the allowance of items which were never considered by all three of the members of the Commission at any time.

In the seventeenth paragraph of the bill it is alleged (Rec., p. 8) that Haupt and Schramme after the resignation of Peña and in his absence—

> "undertook to consider and decide matters not theretofore acted upon by the full Commission, but which had been postponed from a previous meeting for further consideration."

The answer of the defendant denies this in the seventeenth paragraph, and says (Rec., p. 886):

> "At the thirty-third and thirty-fourth sessions of the said Commission, on the 18th and 19th days of October, 1897 (the minutes of which are given on

pages 872 to 906 of the said Record, Exhibit No. 20), when the said Peña was present, all the details of the said finding were passed upon and agreed unto by a majority of the commissioners."

And again said defendants, in the same paragraph of their answer, say that they (Rec., p. 886)—

"deny that the said Commission considered or decided matters not acted upon by the full Commission before that time."

The absolute verity of the allegations in the bill are established overwhelmingly and without even an attempt at contradiction by the evidence taken in this case.

Mr. Harold R. Miller, the secretary of the Commission, was present during all the sessions of the Commission for the discussion of all the items of the award, as appears by the testimony of all who testified in the case—Peña's testimony (Rec. p. 1175), Miller's testimony (Rec. pp. 1158, 1160), Haupt's testimony, defendant's only witness (Rec. p. 1277).

Miller being present at every session swears positively that at the thirty-fourth session, held on Tuesday, the 19th of October, 1897, the consideration of the question of allowing an item of $48,668.18, which is part of the award, was begun and suspended, the consideration of it being postponed to be taken up at a subsequent time to be fixed by the chair (Mr. Haupt), and that the consideration of it was never subsequently taken up by the arbitrators (Rec. p. 1161). He also testifies that at the same session an item of $32,333.40, a part of the award, was taken up and suspended, and the consideration postponed to another day, and the consideration of it was never thereafter resumed (Rec. p. 1161).

The consideration of the item of $10,000 allowance to Mr. Marcus Stine for his services before the Commission was never taken up at any time (Rec. p. 1161).

Mr. Peña in his testimony gives evidence as follows (Rec. pp. 1175–6):

> "Q. Do you remember at the 34th session, on the 19th of October, 1897, the question of allowing an item of $48,668.18 was brought up? Do you remember that item coming up and being postponed at the request of Mr. Haupt? A Yes, I remember that.
>
> "Q. You remember that circumstance? A. Yes, I remember that circumstance.
>
> "Q. Do you remember the circumstance at the same session, of an item for $32,333.40, being the interest claimed by the company, having been postponed at your request? A. Yes, I remember that.
>
> "Q. Was the consideration of either of those items at any time ever taken up at any meeting of the Commission at which you were present? A. Not at any meeting at which I was present after that postponement.
>
> "Q. Was the question of the allowance of $10,000 to Mr. Marcus Stine ever discussed in your presence? A. Never.
>
> "Q. Was it at any time, from the commencement of the sessions of the arbitrators to the end, ever mentioned to you by anybody? A. It was never mentioned."

Mr. Haupt was examined as a witness for the defendant to make certain corrections in the minutes of the Commission (Rec. pp. 1272–4). These corrections refer to pages 640, 731–2 and 735 of the Record, and have no relation to this matter.

Having testified as to these corrections of the minutes, he states on cross-examination as follows (Rec. p. 1278):

> "Q. You have looked over these minutes since they have been printed, have you not? A. I have; yes, sir."

And further on (Rec. p. 1280):

> "Q. Now, these typewritten memoranda which Judge Cross has exhibited to you, and which you

have identified in giving your testimony, are the only corrections in the minutes as printed which you saw occasion to make; is that correct?

"A. Yes, sir.

"Q. *In other respects they correctly represent what took place before the commissioners, according to your recollection?*

"A. *They do.*"

Turning, now, to those minutes which "correctly represent what took place," the proceedings of the thirty-fourth session, on October 19, 1897, show the following:

(Rec. p. 716.) "Gentlemen: Our work yesterday was carried as far as the consideration of the item of bonds. We had just disposed of one item of interest and we have passed over one item of interest. If it be your desire we will consider that item next.

"Mr. SCHRAMME: It is agreeable to me that we consider the items of interest on the $223,909.14 cost of local construction, which interest amounts to $48,668.18 from October 1st, 1893, to January 26th, 1897, the first date being the date up to which construction work was liquidated, and the second date being the date of the delivery of the road to the Government.

"The CHAIRMAN: Gentlemen, this question is before us for consideration as to the impropriety or propriety of allowing interest on the local cost of certain items of construction as stipulated.

"Mr. SCHRAMME: I move that the interest amounting to $48,668.18 on the cost of construction from 31st October, 1893, to 26th January, 1897, at the rate of 6 % per annum be awarded by the Commission to the Cauca Company.

"The CHAIRMAN: Gentlemen, you have heard the motion, which is now before us for discussion."

After some discussion by Mr. Peña and Mr. Schramme, Mr. Haupt thus expresses himself:

(Rec. p. 718.) "The CHAIRMAN: Gentlemen—There have been some weighty considerations advanced on

both sides of the argument, and also other points which occur to the chair, and which have not yet been touched upon, and therefore your chairman would respectfully request *that the consideration of this item be postponed until we can give the matter fuller consideration*, and that typewritten copies of this argument be *submitted to the Commission for that purpose*. His ruling and efforts have been to apply the interpretation of the convention which we have agreed upon strictly to each item, and this one seems to possess exclusively points which *will require deliberate consideration*, hence the request made that the chair be allowed a little time for the further consideration of this item."

Some further discussion among all the commissioners ensues, terminating in the following (Rec. p. 719):

"Mr. SCHRAMME: I understand that the motion remains for the present on the table, to be taken up at the suggestion of the chair.

"Mr. Peña offering no objection to this, the chairman declared that this was agreed."

The item of $32,333.40, part of the award being brought up for consideration, the following took place (Rec. p. 726):

"The CHAIRMAN: The next item for our consideration, gentlemen, is that of the interest on stock and bonds, page 17 of the Preliminary Report. What is the pleasure of the Commission with reference to the items considered under this head?

"Mr. SCHRAMME: That item is $32,333.40, being the interest on the actual amounts paid in on bonds amounting to $124,750.04, due under the subscriptions to the Cauca Company's bonds. I move that this amount be awarded to the Cauca Company by this Commission as part of the amounts expended under construction.

"The CHAIRMAN: This question is now before us for discussion.

"Mr. PENA: There has been presented before this Commission the consideration of an amount payable

for interest on the amount of $233,909.14, which covers the cost of construction, and as the capital subscribed and the products of the bonds issued have been used for this same purpose of construction, I propose that the consideration of this item be postponed for consideration at the same time as the before-mentioned item. In the first place, because I consider that they are one and the same thing; and in the second place, because I think that the convention never had in view the payment of interest, but only the amount spent on construction and equipment."

. . . . . .

(Rec. p. 726): "The CHAIRMAN: Mr. Peña's suggestion was to postpone the discussion of this item on the ground that it was parallel or similar to that of the other item which the chair desires to take time to consider. The chair dissents from the opinion of Mr. Peña on that point for the reason that this is a distinct and well-recognized liability of which there was due notice and for which the company is unquestionably liable to the bondholders, so that the considerations which would apply to the first instance would not be so directly applicable to this. But if it is desired that *this Commission postpone the discussion of this item*, it can be postponed until a decision be reached on the previous point. So far as the chair is concerned that is immaterial."

(Rec. pp. 727–8): "Mr. PEÑA: I wish to state clearly the reason why I asked for the postponement of this question; it is not because of its being of a similar nature as the first item, discussion of which has been postponed, but because the interest that is being discussed now is the same interest as the previous item, and can not, therefore, be considered twice. The reason is this: There is a capital raised by the company for carrying out the enterprise, and this is the amount spent on construction and equipment. If we consider separately the amount recognized as the cost of construction, and the capital raised by the company, and allow interest on both of them, this would come under the same category

as compensation and there would be no limit to the claims, because the capital is one and the same in both cases, and the consideration of the payment of interest on that capital has been suspended for after consideration. If we are going to consider again a part of this capital, and again allow interest on it, it would seem that we can go on repeating this principle like a magic-lantern slide, making the same picture appear several times and making the spectators pay each time to look at it."

. . . . . .

(Rec. p. 728): "Mr. PENA: In my opinion the total cost that the convention allows is covered by the stipulation of the 31st of August, and, therefore, as that is my opinion, and as no amount is as yet due for interest, there is no reason to allow interest beforehand: therefore I submit the following motion: That the consideration of one item of interest shall cover both of them.

"Mr. SCHRAMME: Although the interest item, discussion of which has been suspended, has nothing to do with the question of interest now under discussion, *I consent nevertheless to the postponement of discussion in deference to the wishes of my two colleagues.*"

The minutes will be searched in vain for any discussion or consideration of the allowance of $10,000 to Marcus Stine.

It is thus made a matter of demonstration that two of the members of the Commission undertook, in the absence of any representative on the part of Colombia, to dispose of items aggregating over $91,000, included in the pretended award, and the allegations of the bill in that regard are completely sustained.

Resignation of Peña.

It has already been shown that by the established rules of law, where a matter is submitted to the decision of a number of arbitrators, the power is a joint one and can not

be exercised in any of its parts by less than all, even to the matter of the formal execution of the award, the terms of which have already been unanimously agreed upon by all the arbitrators. It has also been pointed out that by the express provisions of article VI of the agreement for submission (Rec. p. 1209), the full membership of the Commission was to be kept up by appointment of new members in place of any who might cease to act.

In the answer and cross-bill, the defendants not only insist upon the legal power of two of the members of the Commission to act in the absence of the other, but also question the *bona fides* of Mr. Peña's resignation, and charge that it was by agreement with complainant through its diplomatic representative in Washington, and for the purpose of defeating the arbitration. This is specifically and positively denied by the answer to the cross-bill sworn to by General Rengifo, and not a syllable of evidence is offered by defendants on the subject, although some attempt is made to discredit the motives of Mr. Peña in his resignation as shown in his cross-examination (Rec. pp. 1078–87).

Of the legal right of Mr. Peña to retire from the Commission there can be no doubt. It is equally clear that it was beyond the power of the government to compel him to continue in its service even had the opportunity been offered to it.

Under the Thirteenth Amendment to the United States Constitution, involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, can not be required, and the only remedy for a wrongful refusal to perform a contract for service is a legal action for damages. The constitution and law of the Republic of Colombia is the same (Rec. p. 1195).

Furthermore, in the agreement of submission, the parties themselves recognized and admitted this right in each member of the Commission and provided for the contingency of its exercise in the sixth article, where they provide

that "should *any of the members* of the Commission decline or *resign the charge*, OR CEASE TO ACT FOR ANY REASON," "its integrity shall be RESTORED *by new appointment.*"

Whatever may be said of Peña's *motives* in resigning, it is obvious that the legal effect of that act was to remove him from the Commission, to deprive Colombia of any representative therein and to call for the exercise of the provision that the Commission should "be restored by new appointment." This was not done nor was any opportunity given the complainant to make such new appointment, although, as appears by its positive and responsive answer to the cross-bill under the oath of its diplomatic representative (Ans. to Cross-Bill, par. 6, Rec. p. 1105):

> "had this defendant been given the opportunity, it would, under advice of counsel, sometime theretofore given it, *have at once designated a representative in the place and stead of said Pena.*"

It is not pretended that complainant was invited to make a new appointment—on the contrary it is admitted that no such request was made, and although *seven days* remained of the time within which the Commission could undoubtedly have continued to act, the remaining members elected to continue in active exercise of their supposed functions for less than *seven hours* and within that brief period to make up and execute the pretended award.

The thirty-fourth session of the Commission, as appears by its minutes, was held on Tuesday, October 19, 1897 (Rec p. 715), and adjourned to Friday, at 11 A. M., at the Army Building (Rec. p. 731).

At the appointed time and place Messrs. Haupt and Schramme and the secretary met (Rec. p. 732), and the letters of Messrs. Peña and Cisneros announcing the fact of their resignations were presented (Rec. pp. 732–3).

The proceedings then took place between Messrs. Haupt, Schramme, and Stine as there detailed, and at 12.15 were

adjourned to meet at Mr. Stine's office at 2 P. M. of the same day (Rec. p. 736).

The secretary attended at 2 P. M. at Mr. Stine's office, and at 2.30 Messrs. Haupt, Schramme, and Stine appeared (Rec. p. 736). Thereupon the proceedings therein set forth, including the execution of the pretended award in triplicate, took place, and at 5.15 P. M. of the same day, Friday, October 22, 1897, the parties adjourned *sine die* (Rec. p. 746).

Mr. Peña's *motives* in resigning can have no legal consequence to the arbitral body resulting from that act. The sixth article of the submission distinctly provided for that contingency. If one of the arbitrators should "cease to act for any reason" the Commission shall "be restored by new appointment." So that had his motives been the most corrupt possible, the legal consequences must be the same —a new appointment.

As Mr. Peña is not a party to these proceedings and can be neither condemned nor vindicated, it is not deemed material to say more as to his motives than that, in the opinion of counsel for appellants, he was actuated by none but proper motives.

Whatever his motives, however, the Government had no knowledge of them, and was no party to his act of retirement.

The defendants, in their cross-bill, set up the pretension that Peña's resignation was the result of an agreement between him and the government through Rengifo (Rec. pp. 1090–93).

This is positively denied in the answer to the cross-bill under the oath of Rengifo, who characterizes it as a malicious and scandalous falsehood (Rec. pp. 1104–8).

No attempt was made by the defendants to support by testimony this charge in the cross-bill, and the testimony is overwhelming that Rengifo always opposed the resignation, and through his counsel procured and gave to Cisneros written opinion and advice against such a step (Rec. pp. 1104–8, 1176–7, 1188, 1246–7, 1244).

Attempt was made in the cross-examination of Peña to make it appear that the Government at Bogota was notified of the purpose to resign and approved that course.

This very specious contention is easily met. Its basis is that Cisneros, on July 1, 1897, cabled the government advising that Peña retire, and that the government decline to appoint a substitute. That on October 22, 1897, after Peña had resigned, he sent a cable to the government announcing that fact, and that on the 27th Cisneros received a cablegram from the government saying it approved and applauded conduct.

An examination of all the communications to and from the government in their order and in the light of the testimony presents a situation which needs no apology for the government and shows its consistency and rectitude throughout.

On July 1, 1897, Mr. Cisneros sent to the government at Bogota the following cablegram (Rec. p. 1180):

"NEW YORK, July 1, 1897.

"MINISTRO HACIENDA, Bogota:

"Commission has decided against opinion of Peña, that Convention fourth January authorizes other expenses abroad besides those of local construction. Schramme sustains that this was agreed so with government. Renowned counsel advise Peña to resign and I to retire the government, should commission insist on considering all the losses of the company. Please send precise instructions, and in case of instructing our withdrawal it will be necessary that Minister at Washington should not accept substitute. This would give rise to the formation of a new convention.

"CISNEROS."

General Rengifo, being advised of this cablegram of Cisneros, and disapproving thereof, on the very next day, July 2, 1897, sent to the government the following cablegram (Rec. p. 1244):

"July 2, 1897.

"PRESIDENT CARO:

"I know Cisneros' cable to Minister Hacienda relating Cauca Railroad Commission matter. Government should think whether it can sustain grave situation which withdrawal from proceedings creates and then evading compliance Article 6, Convention, January 4. I beg you will pardon patriotic intrusion.

"RENGIFO."

The government sent no reply to the cablegram of Cisneros, but sent a reply to Rengifo's cablegram with instructions to communicate its contents to Cisneros so as to notify the Commission (Rec. pp. 1106, 1241, 1250). This cablegram was not in any sense an approval of the project contained in Cisneros' cablegram, but was a distinct approval of the contrary position taken by Rengifo and his counsel, in line with their written opinion and advice (Rec. p. 1106), and is in the following words (Rec. p. 1250):

"BOGOTA, July 5, 1897.

"MINISTER OF COLOMBIA, New York:

"Should commission condemn Government to pay losses Cauca Railroad for things other than expenses of construction the Government will not accept award as openly violative clearest agreement January fourth. Communicate to Cisneros so as to notify commission.

"ESGUERRA."

No copy of the cablegram sent by Peña to the Government at Bogota, on October 22, 1897, announcing his resignation was obtainable, though all proper effort to secure and produce it was made by complainant's counsel (Rec. p. 1249).

Whatever its contents, no reply was received by Peña (Rec. p. 1185). The only cablegram received by Cisneros was in response to one sent by Cisneros and the counsel for complainant [Mr. Carlisle] in the joint name of Cisneros and Rengifo.

In a letter of Saturday, October 23, 1897, to his counsel,

Mr. Carlisle, General Rengifo gives the latter express authority to sign his, Rengifo's, name to cables to the government (Rec. p. 1245), and on Sunday, the 24th of October, 1897, the following cable, composed by the counsel and Cisneros, and sent in the joint names of Cisneros and Rengifo, was dispatched to Bogota (Rec. pp. 1232–6):

"NEW YORK, October 24, 1897.

"To the SECRETARY OF THE TREASURY,

"Bogota.

"After careful examination of the minutes of the commission, including the pretended award, Messrs. Carlisle & Johnson, both present in New York, advise that a proceeding be instituted in the name of the Government of Columbia against the Cauca Company in the Federal courts to declare the nullity of the pretended award and to prevent the Cauca Company from making use of said award against the Government. This proceeding is authorized by the laws of the United States for the purpose of declaring null an award on the ground that it is *ultra vires* or based on fraud, or a grave mistake (clear equivocation) of fact or law. This step will forestall (prevent) any influence of the interested party in the State Department here. It will make the matter public in order that public opinion may work in our favor. It will avoid the diplomatic intervention which the company has promised itself and it will preserve the private character of the convention of the 4th of January between the government and the company.

"We are of opinion that the plan proposed is prudent and necessary, and for this reason we have employed counsel (*juris consults*) and ordered the preparation of documents for the purpose. It is urgent that the government should authorize Rengifo by cable immediately to file the suit in the name of the government, since in order to be efficacious it is necessary that the action be started without delay and for legal effects the express authorization of the government to Rengifo is indispensable on receipt of this.

"RENGIFO.

"CISNEROS."

(Rec. p. 1249).

From September 11, 1897, to October 24, 1897, Cisneros sent no cable to the Government (Rec. p. 1232), and from the 18th of September, 1897, until the 27th of October, 1897, Cisneros received no cablegram from the Government (Rec. p. 1237).

On the 27th of October Cisneros received a cable from the Government in the following words (Rec. p. 1238):

> "Gobierno aplaude y aprueba conducta. Autorizamos Rengifo;"

which reads in English (Rec. p. 1239):

> "Government approves and applauds conduct. We are authorizing Rengifo,"

and on the same day General Rengifo received a cablegram from Bogotá as follows (Rec. p. 1250):

> "Received at Washington, D. C., Oct. 27, 1897."
>
> "Bogota, October 26, 1897.
>
> "Minister Colombia,
>
> "Washington, D. C.
>
> "I authorize you to enter against Cauca Company in name of Government before Federal courts of that country, which inspire full confidence, suit to nullify pretended award of incomplete arbitration commission Cherry matter.
>
> "Gomez."

In view of the contents of the cable of October 24, 1897, sent by the counsel and Cisneros in the name of Cisneros and Rengifo, there can be no doubt that the cablegram from the Government to Cisneros approving and applauding conduct and authorizing Rengifo was in reply to the cablegram of October 24, 1897, advising suit and asking the authorization of Rengifo.

Thus it will be seen that, in July, 1897, Mr. Cisneros, under the advice of other counsel, suggested and urged the resignation of Peña and so informed the Government. The Government, however, never acted on that advice and never authorized the resignation, but took the very proper atti-

tude of advising both Cisneros and the Commission, through Rengifo, that if the award should exceed the authority given the Commission the Government would not abide by it.

When finally Peña did resign and notified the Government by cable and letter he received no reply whatever, while to the cable of October 24, 1897, of Cisneros and Rengifo advising recourse to United States courts to test validity of award and asking authority for Rengifo to institute proceedings, the Government cabled to Cisneros that it approved and applauded conduct, and was authorizing Rengifo to proceed, which it actually did the same day.

It is clear, therefore, that the complainant was in no respect responsible for the action of Peña, and that he acted, not under its suggestion or with its approval, but against its advice and wishes.

While the circuit court condemns the conduct of Peña, it finds that the Government was not responsible therefor (Rec. p. 1297), but does not indicate why the Government should not have been given the opportunity to exercise its right of a new appointment under the mandatory provisions of the sixth article of the submission.

The only suggestion made by defendants against the right to a new appointment is that the time for the completion of the arbitral labors was nearly exhausted, there being but eight days yet remaining.

But, it is submitted, the proper construction of the submission requires that the provisions of the eighth article limiting the time for decision and of the sixth article imperatively requiring a new appointment must be construed in harmony and not in antagonism, and that any time consumed in the substitution of arbitrators under the sixth article must not be considered in computing the time limited by the eighth article; otherwise the two provisions might, under the ordinary contingencies of life, destroy the entire

submission, a result which, it is submitted, is not within the intent of the instrument.

Even if it were conceded that the arbitrators in this case could have made a valid award by a majority vote, that concession would not meet this situation.

It will not be pretended that if Peña had died or resigned in May, that the remaining arbitrators would have had the right to go on without waiting for his successor to be appointed,—not because it would have prevented unanimity, but because it would have prevented Colombia from having a representative in the arbitration.

Who can say that if the arbitrators had waited until the next day Rengifo would not have appointed a successor? Who can say that such successor would not have been able to persuade Haupt that the items of interest and the $10,000 awarded to Stine were improper to be allowed in the award and thereby kept out of the award over $90,000? Who can say that if Colombia had had a representative in the arbitration at the time the award was made that such representative might not have prevailed upon his associates to make a more favorable arrangement as to the mode of payment?

All these rights existed in the complainant, and were intended to be preserved by the express provisions of the sixth article, by which the right of each party to a representative throughout was guaranteed. By the hasty action of the other arbitrators Colombia was denied the opportunity to be heard. The government did not refuse to appoint a successor, but Haupt and Schramme rendered such appointment impossible by hastily making up an award and adjourning *sine die* within a few hours, when there were yet eight days during which the arbitrators could lawfully act, even if the exercise of the right of a new appointment, under the sixth article, would not have had the effect of restricting the operation of the limits of the eighth article during the time consumed in such new appointment.

This right of Colombia is wholly unaffected by the question of the rule of unanimity or majority decision and concerns only the right of representation.

V.

Errors as to Allowance of Interest and Costs.

The Twenty-fourth and Twenty-sixth Errors Assigned.

By the terms of the decree (Rec. p. 1304), interest is required to be paid from January 26, 1898, on the part of the award which the court sustains, and no costs are allowed to the complainant (Rec. p. 1305).

The good faith of the complainant, an independent foreign state, in coming and submitting to the jurisdiction of the municipal courts of this country a controversy between itself and citizens of the United States can not be doubted. The proceeding was promptly begun, the award being made on October 22 and the bill filed on December 15, 1897, while in the conduct of the cause itself the complainant has shown unusual diligence.

It is to be noted that the award is for a gross sum, without specifying the items of which it is composed, and the complainant, while contending that it was bad *in toto*, could not separate the elements of the award without the aid of a court of equity.

Its appeal to the court has been justified by the decree which disallows the large sum of $104,644.91.

Under the established rules in equity, interest, in the absence of contract, is merely damages for delay, and is not allowed upon any *unliquidated* demands until after they have been reduced to certainty by judicial determination.

In this case the intricacies and difficulties of the case were such that the learned circuit judge found himself able to decide the case only after long investigation. The case was submitted on the 11th of April, 1900, and it was not

until January 9, 1901, that he was able to render a decision upon the questions.

There was never a time when complainant was legally or equitably bound to pay this award, *as rendered by the arbitrators*, or to pay any part of it, until the court, by its judgment, had separated the valid from the invalid, which the court could do only by the complainant's voluntary submission to its jurisdiction.

In such a case courts of equity do not impose damages by way of interest from a date prior to the decree.

In the case of San Bernardina County *vs.* Southern Pacific Railroad, 118 U. S. 417, an assessment had been levied for taxes a part of which was valid and a part invalid. The court held that the county could not recover interest upon the valid part of the assessment, saying (p. 422):

> "The plaintiff, not then being entitled to judgment for the taxes originally in question, . . . it follows that the plaintiff can not have judgment in its favor for penalty, interest, and attorney's fees. Apart from every other view the defendant could not be adjudged liable for penalty, interest, or attorney's fees for not paying taxes arising out of an invalid assessment, and which, under the law, were not collectible by suit."

Here, if complainant were a private citizen, the award as rendered could not have been enforced, and in a suit thereon no interest would be allowed upon the valid part until after it was ascertained by judgment.

Upon the same principle that interest should not have been allowed except from the date of the decree, costs should have been allowed complainant. An award, which by the decree below was $104,644.93 in excess of what the arbitrators had the right to allow, has by proceedings of the complainant been reduced by that amount. Upon the plainest principles of justice the complainant should be allowed the

costs it has incurred in the judicial proceedings which were necessary to reach that result.

The Eighteenth, Nineteenth, Twentieth, and Twenty-seventh Errors Assigned.

It is submitted that in the foregoing brief the invalidity of the award has been demonstrated upon each and all of the grounds set forth. The court below, it is respectfully submitted, erred in holding that the award had any validity, in not decreeing it to be null and void, and in not directing it to be canceled and in not making the preliminary injunction perpetual as to the entire award.

The parts of the decree of the circuit court appealed from by complainant should have been reversed.

CONCLUSION.

In the foregoing brief counsel has sought to assist the court in the examination and correct understanding of the somewhat heterogenous record in this cause, and has also endeavored to point out with entire fairness and sincerity the real questions of law and fact which seem to be raised in the cause and call for disposition by the court.

A most important and unusual step has been taken by the complainant, an independent sovereign state, by submitting to a court constituted under the permanent laws of another Government the adjudication of a controversy between it and the citizens of that Government.

The responsibility of advising an independent sovereign state to appear as an ordinary suitor in a court of the United States, submitting itself to the jurisdiction and control of that court, is not a light one, and the consequent duty upon counsel is to see that every right, both great and small, and every rule, whether substantial or technical, shall be strictly recognized and adhered to, a requirement the more imperative in view of the fact that the controversy grows

out of the abuse of a jurisdiction voluntarily conferred upon arbitrators.

While insisting on every contention made in behalf of complainant, it is confidently submitted that if any objections may be disregarded, the substantial and controlling facts remain, that in the proceedings taken by them, the arbitrators grossly misinterpreted the scope of the submission limiting their jurisdiction, and extended their inquiries and judgment to matters never submitted for decision, and that each and every one of the disputed items of the award were founded upon subjects not comprehended by the submission, and were claims solely of a corporation not a party to nor interested therein.

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Fourth Circuit in so far as it affirms the portions of the decree of the circuit court from which complainant appealed should be reversed.

WM. G. JOHNSON,

Counsel for the Republic of Colombia.

APPENDIX.

EXTRACTS FROM THE CODE OF WEST VIRGINIA OF 1887.

Section 1 of chapter 54 provides that—

"Joint stock companies incorporated under this chapter shall be subject to the provisions of the fifty-second and fifty-third chapters of the code so far as the same are applicable."

Section 1 of chapter 53 provides that—

"The words 'joint stock company' include every corporation having a joint stock or capital divided into shares owned by the stockholders respectively."

Section 2 of chapter 53 provides that—

"When the word 'by-law' is used in this chapter, it is to be understood as if immediately followed by the words 'adopted by the stockholders in general meeting assembled.'"

Section 49 of chapter 53 provides that—

"For every corporation subject to this chapter *there shall be a board of directors who shall have power to do, or cause to be done, all things that are proper to be done by the corporation.* The stockholders may in general meeting, by a by-law, prescribe the number of which the board shall consist, but unless a different number be so prescribed there shall be five directors. They may also by a by-law prescribe the qualifications of directors; but if it be not otherwise provided, every director must be a resident of this state and a stockholder. The directors shall be elected at the annual meeting of the stockholders or as soon thereafter as practicable and shall hold their offices until their successors are elected and qualified."

Section 50, chapter 53, provides that—

"As soon as may be, after the election, *the board of directors shall choose one of their own body president of the corporation*, who shall act as such till his successor is qualified, without ceasing, however, to be a member of the board. During the absence of the president the board may appoint a president pro tempore, who for the time shall discharge the official duties of the president."

Section 15 of chapter 54 provides that—

"When a certificate of incorporation is issued under the ninth section, the corporators named in the agreement recited therein, or a majority of them, shall appoint the time and place for holding a general meeting of the stockholders *to elect a board of directors, make by-laws, and transact any other business which may lawfully be done by the said stockholders in general meeting. The time appointed for the meeting shall not be less than twenty-one nor more than ninety days from the date of the certificate, and at least two weeks' notice of such meeting shall be given by advertisement* in the manner prescribed in the forty-first section of chapter fifty-three of the code."

Section 16 of chapter 54 provides that—

"After a certificate of incorporation has been issued pursuant to the ninth section, and before a board of directors have been elected or qualified, additional shares of the capital stock may be disposed of, so that the maximum capital be not exceeded, in such manner, on such terms, at such times and places, and under the superintendence of such persons as the corporation named in the agreement recited in such certificate, or those holding a majority of the shares may appoint, but subject to the provisions of the twenty-third and four following sections of chapter fifty-three of the code."